Supreme Court, U.S.
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Supreme Court of the United States

WAYNE G. LOVELY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "incident to service" test provided by the jurisprudence of this Court in *Feres v. United States*, 340 U.S. 135 (1950) and its progeny requires inquiry into the (1) duty status of the claimant, (2) the site of injury, and (3) the activity being performed by the claimant to determine whether a claim under the Federal Tort Claims Act ("FTCA") is barred by the *Feres* doctrine when the United States Court of Appeals for the Sixth Circuit extends the doctrine to *all* injuries suffered by any claimant that are even remotely related to the claimant's *status, relationship or affiliation* with the military service and where the standard adopted by the Sixth Circuit effectively abolishes FTCA actions in the Sixth Circuit and is in conflict with a wealth of decisions of this Court and other circuit courts.

2. Whether the Sixth Circuit Court properly bars a FTCA claim under the "incident to service" test provided by the jurisprudence of this Court in *Feres v. United States* and its progeny when the Sixth Circuit's analysis examines if the claim implicates military discipline and where the Sixth Circuit's analysis conflicts with this Court's most recent decision on the matter in *United States v. Stanley*, 483 U.S. 669 (1987).

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OPINIONS AND ORDERS BELOW

The decision by the Sixth Circuit Court of Appeals that gives rise to this Petition is reported at 570 F.3d 778 (6th Cir. 2009), *Lovely v. United States*. A copy of that decision is reprinted in the Appendix hereto, App. 1. The decision of the District Court granting the government's motion to dismiss was not reported. A copy of the decision is reprinted in the Appendix hereto, App. 18.

JURISDICTIONAL STATEMENT

On March 17, 2008, the District Court granted the government's motion to dismiss Wayne G. Lovely's ("Lovely") Complaint.

On March 31, 2008, Lovely initiated an appeal to the United States Court of Appeals for the Sixth Circuit.

On June 26, 2009, the Sixth Circuit affirmed the District Court's decision.

This Petition for Writ of Certiorari is being timely filed in accordance with Rule 13.1 of the Rules of the Supreme Court of the United States. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on Writ of Certiorari the Opinion of the Sixth Circuit Court of Appeals.

STATUTORY PROVISION INVOLVED

Lovely's claim arises under the Federal Tort Claims Act. 28 U.S.C. § 2674 provides, in part: "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF THE CASE

On June 9, 2006, Lovely filed a Complaint against the Government in which he alleged that the Government violated his rights under the Privacy Act (5 U.S.C. § 552(a)) and Army Regulation ("AR" 340-21) by releasing a document or record of Lovely to a third party, which was maintained in the University of Dayton, Military Science Department files/records under these authorities. Lovely requested compensatory damages, costs and fees, and equitable relief arising from the Privacy Act violation.

The Government filed a Motion to Dismiss for Lack of Jurisdiction on August 18, 2006. Lovely was granted leave to amend his Complaint to add a claim for intentional infliction of emotional distress ("IIED") under the Federal Tort Claims Act ("FTCA"). In his Amended Complaint, Lovely alleged that Versalle Washington ("Professor Washington"), a professor of military science at the University of Dayton, Dayton,

Ohio, "wrongfully and intentionally inflicted emotional distress upon Lovely, by releasing the Privacy Act protected document, making false statements about Lovely to University of Dayton students, wrongfully interfering with the University of Dayton Non-Academic Disciplinary Board . . . and intimidating Lovely's intended witnesses before this proceeding."

The Government filed a Second Motion to Dismiss on November 20, 2006, which the District Court granted on March 17, 2008.

Lovely filed a Notice of Appeal with the Sixth Circuit on March 31, 2008. On June 26, 2009, the Sixth Circuit affirmed the District Court's decision. *Lovely,* 570 F.3d at 778-85. (A at p. A-1).

Senior Sixth Circuit Court Judge Karen N. Moore wrote the opinion for the Court. In support of its decision, the Court said:

> The language of the FTCA [Federal Tort Claims Act] exempts from this waiver of immunity claims "arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war". 28 U.S.C. § 2680(j). In *Feres v. United States,* 340 U.S. 135 (1950), the Supreme Court significantly broadened this exception and created the *Feres* doctrine, pursuant to which "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to

service." 340 U.S. at 146; *accord Fleming*, 186 F.3d at 699.

As this Court previously noted, subsequent Supreme Court cases have further extended this doctrine.

> Review of these Supreme Court precedents make it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose. *Major v. United States*, 835 F.2d 641, 644-45 (6th Cir. 1987).

In the most recent Supreme Court case examining the *Feres* doctrine, the Court explained that, "a service member is injured incident to service" if the injury is "because of his military relationship with the Government," *United States v. Johnson*, 481 U.S. 681, 689 (1987), and reiterated the three broad rationales underlining the doctrine, *id.* at 689-90; *see* also *United States v. Shearer*, 473 U.S. 52, 57 (1985); *Stencel*

Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977). "First, '[t]he relationship between the Government and members of its armed forces is "distinctively federal in character."'" *Johnson*, 481 U.S. at 689 (alteration in original) (quoting *Feres*, 340 U.S. at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947))). "Second, the existence of [] generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Id.* "Third . . . suits brought by service members against the Government for injuries incurred incident to service . . . are the '*type*[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Id.* at 690 (alteration in original) (quoting *Shearer*, 473 U.S. 59).

Although this is a close case presenting unique circumstances that do not fall directly in line with other cases applying the *Feres* doctrine, we conclude, in light of the doctrine's rationales and the Court's broad interpretation of the doctrine, that the district court properly dismissed Lovely's IIED [Intentional Infliction of Emotional Distress] claim as barred by the *Feres* doctrine. Initially, Lovely argues that his claims are not subject to the *Feres* doctrine because he was not on active duty or subject to military command or discipline while attending classes at UD or while involved in the UD disciplinary proceedings. We have

> noted, however, that "the *Feres* doctrine extends beyond situations where the soldier is acting pursuant to orders or while subject to direct military command or discipline." *Sidley v. United States*, 861 F.2d 988, 990 (6th Cir. 1988); *accord Skees v. United States*, 107 F.3d 421, 423 (6th Cir. 1997) ("[T]he term 'incident to service' . . . is not a term limited to military training and combat.")

Lovely, 570 F.3d at 782-83. (App. 1).

The Sixth Circuit Court supports its holding by citing to a limited number of other circuits' decisions concerning claims of other candidates for military service. As explained below, the Circuit Court's decision misconstrued the admittedly unique facts of Lovely's case and misapplied the *Feres* doctrine.

In *Feres v. United States*, this Court limited the applicability of the FTCA with respect to military personnel when it held that "the Government is not liable under the [FTCA] for injuries to [service members] where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. Accordingly, the answer to the question whether an activity or injury is "incident to military service" determines whether a service member may pursue an FTCA cause of action. *Parker v. United States*, 611 F.2d 1007, 1009 (5th Cir. 1980).

Feres and its progeny do not articulate a specific method for determining whether an injury is "incident to military service". This Court's decisions

in *United States v. Stanley*, 483 U.S. 669 (1987) and *United States v. Shearer*, 473 U.S. 52 (1985) conflict with respect to whether a court should examine the likelihood of disruption of military judgments in a particular case to determine if an activity is "incident to military service". Lower courts adopt varying approaches to determine whether an activity is incident to service and bars a FTCA claim under the *Feres* doctrine. *See Parker*, 611 F.2d at 1009 (noting "[t]he Supreme Court cases under the *Feres* doctrine . . . offer policy reasons for implying an exception [under the FTCA for injuries to service members], but do not provide many clear signposts to the parameters of 'incident to service'"); *see also Regan v. Starcraft Marine*, 524 F.3d 627, 636 (5th Cir. 2008) (noting "[t]he clarity with which *Shearer* stated that the likelihood of disruption of military judgments in a particular case was critical in determining whether to apply the *Feres* bar, despite the later *Stanley* decision's equally clear statement that it was not"). This Court should grant Petitioner, Wayne G. Lovely's ("Lovely"), Petition for Writ of Certiorari to clarify the *Feres* doctrine's proper application, foster uniformity among the circuit courts, and prevent the unjust decisions such as those that have resulted from the application of the circuit courts' varying standards.

REASONS FOR GRANTING THE PETITION

I. QUESTION ONE

This Court should grant Lovely's Petition for Writ of Certiorari to determine whether the "incident to services" test provided by the jurisprudence of this Court in *Feres* and its progeny requires inquiry into the (1) duty status of the claimant, (2) the site of injury, and (3) the activity being performed by the claimant to determine whether a claim under the FTCA is barred by the *Feres* doctrine where the United States Court of Appeals for the Sixth Circuit extends the doctrine to *all* injuries suffered by military personnel that are even remotely related to the claimant's *status* as a member of the military and where the standard adopted by the Sixth Circuit effectively abolishes FTCA actions in the Sixth Circuit and is in conflict with a wealth of decisions of this Court and other Circuit Courts.

It is well settled that "the Government is not liable under the FTCA for injuries to *servicemen* where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146 (emphasis added). In determining whether a particular claim is *Feres* barred, most lower courts apply a three-part "incident to service" test. *Schnitzer v. Harvey*, 389 F.2d 200, 203 (D.C. Cir. 2004). Jurisdictions that do not follow the majority approach continue to engage in an analysis of the claimant's purported military status or the scope of the claimant's employment in relation to the claimant's

injury. *See Borden v. Veterans Admin.*, 41 F.3d. 763 (1st Cir. 1994); *Taber v. Maine*, 67 F.2d 1029 (2nd Cir. 1995). However, the Sixth Circuit follows neither of these approaches. *See Major v. United States*, 835 F.2d 641, 644 (6th Cir. 1987).

The Sixth Circuit expands the *Feres* doctrine and applies it "at a minimum, [to] *all* injuries suffered by *military* personnel that are even remotely related to the individual's *status* as a member of the military." *Id.* at 644 (emphasis added). The Sixth Circuit Court's opinion in both this matter and in *Major* so broadly reads *Feres* that the Court effectively precludes *all* tort claims brought by *any* claimant who is in *any* way affiliated with the military service. *See Lovely*, 570 F.3d at 782-83. (App. 1). As such, the Sixth Circuit's approach to the *Feres* bar leads the Court to inconsistent results in relation to other circuits, starkly contrasts with the *Feres* doctrine's rationale, and leaves claimants such as Lovely with no cause of action under any set of circumstances.

A. Majority Approach

In determining whether a particular claim is *Feres* barred, the majority of courts apply a three-part "incident to service" test. *See Schnitzer*, 389 F.3d at 203; *Richards v. United States*, 176 F.3d 652, 655 (3rd Cir. 1999); *Stephenson v. United States*, 21 F.3d 159 (7th Cir. 1994); *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987); *Johnson v. United States*, 714 F.2d 1431, 1436-41 (9th Cir. 1983); *Miller v. United States*

643 F.2d 481, 483 (8th Cir. 1981); and *Parker*, 611 F.2d at 1013-15. These courts analyze (1) the injured service member's duty status, (2) the site of the injury, and (3) the nature of the activity engaged in by the service member at the time of his injury to determine whether a member of the military may bring a claim against the government under the FTCA. *Id.* In applying the three factor test, none of the three factors are itself dispositive and each factor contributes to the Court's assessment of the totality of the circumstances in determining whether the injury is properly understood as "incident to service" within the meaning of *Feres*. *Id.*

B. Minority Approaches

The minority of jurisdictions approach the *Feres* bar by focusing primarily on the claimant's status as a service member or the scope of the claimant's military service in relation to the claimant's injury. The results vary as to whether the minority approaches reach the same or similar result as the majority approach.

1. Military status in relation to claimed injury analysis

In the First Circuit, the Court examines the claimant's military status in relation to the injury suffered to determine whether the injury occurred incident to service. *Borden* at 763-64. Although not explicitly stated, it is clear that the Court determined

the claimant's military status by looking at the traditional indicia such as the claimant's orders to active duty, enlistment contract, military identification card, and witness testimony. *See id.* The First Circuit also determines whether the claimant's injury results from an activity that is the benefit of military service. *Id.*

2. Employment law analysis

In the Second Circuit, the Court first considers the claimant's purported status as a military service member and then examines the same traditional indicia used by the First Circuit to determine the claimant's military status. *Taber*, 67 F.2d at 1049-50. Further, the Second Circuit reviews the activity in which the claimant was involved at the time of the injury and applies the general principles found in employment law to determine whether the claimant was "engaged in activities that fell within the scope of the plaintiff's military employment." *Id.* at 1050. If the claimant's activity falls within the scope of the claimant's military employment, the Court bars the claim. *Id.* If the activity does not fall within that scope, the Court does not bar the claim "absent unusual circumstances that would call into play the *Feres* discipline rationale." *Id.* With regard to "discipline rationale" the *Taber* Court recognized that its authority extended to all cases except where its

exercise of authority constituted "significant interference" with military decisions.[1] *Id.* at 1046.

3. Duty status analysis

The Fourth Circuit uses a relatively mechanical test derived from *Feres* to determine whether an injury is incident to service. *Hass v. United States*, 518 F.2d 1138, 1140 (4th Cir. 1975). The Fourth Circuit notes that

> [t]he phrase "incident to service" was given context by Justice Jackson in *Feres* when, after setting out the facts of the three appeals there under review, he stated: "the common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others, in the armed forces."

Id. (citing *Feres*, 340 U.S. at 138). Noting that the *Feres* test has the virtue of simplicity and is supported by cogent policies, the Fourth Circuit places an emphasis on the claimant's duty status, ignores the subjective rationales of the *Feres* doctrine, and looks to the benefits the claimant was enjoying at the time of the suffered injury. *See Id.*

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[1] The Second Circuit's analysis of the "incident to service" test provides one example of how lower courts commingle the "incident to service" test with the third rationale behind the *Feres* doctrine as a result of the conflict between this Court's decisions in *Shearer* and *Stanley* discussed *infra*.

4. Status at time of injury analysis

The Tenth Circuit's analysis focus for "[w]hether a serviceman's injury arises out of activity 'incident to service' depends on whether it stems from an official military relationship between the negligent person and the serviceman." *Harten v. Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974). Put differently, the Circuit focuses on the military status of the claimant at the time the claimant suffers injury to determine if the *Feres* bar applies. *Id.* The Circuit also looks to whether the claimant is on leave or inactive at the time of injury, if the injury stems from a military relationship, and whether the benefits being enjoyed by the claimant at the time of injury were a result of the claimant's military status. *Id.* As such, the primary focus of the Tenth Circuit is on the claimant's military status at the time of injury. *See id.*

C. Sixth Circuit Approach

The Sixth Circuit's opinion in the case at bar affirms the Court's overly-broad stance with respect to the *Feres* doctrine and the "incident to services" test. *Lovely*, 570 F.3d at 782-83. The Court expands the *Feres* doctrine:

> to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, *without regard* to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the

> essential defense/combat purpose of the military activity from which it arose.

Id. (citing *Major*, 835 F.2d at 644-45) (emphasis added). The expansive approach taken by the Sixth Circuit conflicts with a wealth of decisions of this Court and other Circuit courts.

Unlike the majority approach, the Sixth Circuit analysis focuses entirely on the status of the claimant in the military rather than examining the claimant's duty status in relation to the location of the injury and activity being performed when the claimant suffered injury. This results in a claimant's suit being barred solely because of the claimant's status in the military. In addition, it ignores factual inquiries the majority of jurisdictions emphasize and provide an incomplete analysis of the totality of circumstances resulting in a serviceman's injury.[2]

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[2] In the case at bar, the Sixth Circuit's decision relies solely upon Lovely's status as a university ROTC student in deciding to bar Lovely's claim to the exclusion of the location of Lovely's injury and the nature of the activity Lovely participated in when injured. Effectively, the Court's decision acted as a blanket denial of Lovely's claim, simply because he was in the ROTC program. Using the majority approach's analysis, a university ROTC student cannot be a service member within the meaning and intent of *Feres*, absent some qualifying activity or additional authorization. *See, e.g., Regan*, 524 F.3d at 636-38 (recognizing the necessity of analyzing both the *status* of an active duty service member on the continuum between performing tasks of an assigned mission to being on extended leave from duty and the *activity* in which the claimant was involved when injured as essential to a proper analysis under *Feres*). This holds true

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Although more analogous to the minority approaches, the Sixth Circuit's analysis differs from the minority approaches in that it is more expansive. In addition, the minority approaches analyze in depth the relationship between the status and scope of the military service and the activity in which the claimant was injured, which the Sixth Circuit does not do.

D. Question One Conclusion

Because the approach taken by the Sixth Circuit effectively abolishes FTCA actions by service members in the Sixth Circuit and conflicts with a wealth of decisions of this Court and other Circuit courts by reading the *Feres* doctrine too broadly, this Court should grant Lovely's Petition for Writ of Certiorari to

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because ROTC students have a *conditions precedent contract* and do not have the proper duty status to apply the *Feres* bar. *See Army Regulation 145-1*, Reserve Officer's Training Corps Program: Organization, Administration and Training, July 22, 1996 (under revision) (noting that before an ROTC student may be commissioned as an officer or enlisted in the service, the student has to meet certain conditions precedent, including completing certain educational requirements, passing a physical examination, passing drug screening and sexually transmitted diseases tests, undergoing a criminal background investigation, attending basic training, undergoing a background check for gaining access to classified information, and having physical, psychological, and mental ability tests administered) (emphasis added). Thus, unless the student is "on orders" or participating in military-related activity when injured, an ROTC student's role is too far removed from the core concerns of *Feres* to apply the *Feres* bar.

determine the reach of the *Feres* bar and the factors Circuit courts should employ in administering the "incident to service" test.

II. QUESTION TWO

This Court should grant Lovely's Petition for Writ of Certiorari to determine whether the Sixth Circuit Court properly bars a FTCA claim under the "incident to service" test provided by the jurisprudence of this Court in *Feres* and its progeny when the Sixth Circuit's analysis examines if the claim implicates military discipline and where the Sixth Circuit's analysis conflicts with this Court's most recent decision on the matter in *Stanley*. Although *Feres* and its progeny do not provide clear signposts to the parameters of "incident to service", the Supreme Court cases interpreting the doctrine offer policy reasons for implying an exception to a service member's FTCA cause of action. The policy reasons explain the Supreme Court's justifications for the *Feres* doctrine and provide as follows:

> [First], [t]he relationship between the Government and members of its armed forces is distinctively federal in character. This federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service.
>
> * * *

> Second, the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries. In *Feres*, the Court observed that the primary purpose of the FTCA "was to extend a remedy to those who had been without; if it incidentally [benefitted] those already well provided for, it appears to have been unintentional."
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> * * *
>
> Third, *Feres* and its progeny indicate that suits brought by service members against the government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of the military discipline and effectiveness."

Johnson v. United States, 481 U.S. 681, 689-90 (1987). This Court addressed the application of the *Feres* doctrine's policy rationale in *Shearer* and *Stanley*.

A. *United States v. Shearer*

This Court handed down its decision in *Shearer* on June 27, 1985, finding the third *Feres* doctrine rationale critical in making a case-by-case analysis. *Shearer*, 473 U.S. at 57. In *Shearer*, the first two rationales were found to be "no longer controlling",

and the location of the incident was deemed less important in deciding whether *Feres* should apply. *Id.* The *Shearer* decision stood for the proposition that allegations going directly to the management of the military and litigation of that issue would impermissibly involve the courts in reviewing military judgments. *Id.* at 58-59. However, just as the *Shearer* court stated with such clarity that the likelihood of disruption of military judgments in a particular case was critical in determining whether to apply the *Feres* bar, this Court's subsequent decision in *Stanley* made it equally clear that such an inquiry was *not* critical. *See, e.g., Regan*, 524 F.3d at 635-36.

B. *United States v. Stanley*

The majority in *Stanley* sought a straightforward application of the "incident to service" test and set forth "an objective rule that did not examine whether specific litigation would interfere with military judgments, discipline, and management" under the third *Feres* rationale. *Id.* at 635. The *Stanley* court reasoned that the "incident to service" test "provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters." *Stanley*, 483 U.S. at 682-83. The Court explained that "discovery procedures such as depositions that would be needed to determine how disruptive a review of the military judgment would be, would themselves be disruptive." *Id.* As a result, the *Stanley* court highlighted a bright line rule that required a less extensive inquiry into military

matters and imposed the *Feres* bar only when the injury was incident to service. *Id.*

C. Question Two Conclusion

The conflicting direction provided by *Shearer* and *Stanley* creates uncertainty at the District and Circuit court levels and leads to inconsistent results. Pursuant to *Stanley*, this Court made the "incident to service" analysis controlling for the *Feres* bar, regardless of whether the particular litigation would intrude alarmingly on military judgments. *Stanley*, 483 U.S. 682-83; *see also Regan*, 524 F.3d at 646. As noted by the Fifth Circuit, the conflict between this Court's decision in *Shearer* and *Stanley* "may be what has caused this and other circuits since the date of both precedents to continue to examine the applicability and rationales in specific cases." *Reagan*, 524 F.3d. at 636. Certainly, if a claim is based on an injury that was incident to service and, if resolving that claim would also demand second-guessing of military judgment, an application of *Feres* is clear. *Id.* However, an application of Feres is not clear where the "incident to service" test and the military judgment rational conflict or are commingled. *See id.*

As a result of the *Stanley* and *Shearer* decisions, there exists a split in authority with respect to the analysis courts should conduct with respect to the "incident to service" test and the third *Feres* rationale. Courts remain unsure whether to make the straightforward and objective application of the

"incident to service" test provided in *Stanley* or to follow the Court's prior decision in *Shearer* by looking at the likelihood of disruption of military judgments in each particular case. As noted in *Regan*, courts often continue to examine the applicability of the rationales in specific cases, much like the Sixth Circuit did in the *Lovely* opinion. Following this Court's most recent opinion in *Stanley*, lower courts should not engage in an analysis of the *Feres* doctrine's third rationale.

The *Feres* test is the virtue of simplicity, always an important consideration, while examining the rationale behind the *Feres* test presents difficult fact questions in every instance. *Hass*, 518 F.2d at 1141. Consequently, the Sixth Circuit, by examining the impact allowing this suit to proceed would have on military command or discipline, turned the simplistic *Feres* test into a difficult fact question.

Although the Sixth Circuit notes that the *Lovely* case is a close case presenting unique circumstances that do not fall directly in line with other cases applying the *Feres* doctrine, a proper examination of the matter by applying the straightforward and mechanical approach highlighted in *Stanley* would have eliminated the difficulty in assessing Lovely's situation. Because the conflict between *Stanley* and *Shearer* has given rise to differences in application across the Circuits, this Court should grant Lovely's Petition for Writ of Certiorari to determine whether courts should apply the straightforward application of the "incident to services" test as provided in *Stanley*

or undertake the subjective inquiry into the likelihood of disruption of military judgments highlighted in *Shearer*.

CONCLUSION

For all the foregoing reasons herein, the Court should grant the Petition for Writ of Certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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570 F.3d 778

United States Court of Appeals,
Sixth Circuit.
Wayne G. **LOVELY**, Plaintiff-Appellant,
v.
UNITED STATES of America, Defendant-Appellee.
No. 08-3524.

Argued: June 18, 2009.
Decided and Filed: June 26, 2009.

ARGUED: Kevin P. Podlaski, Carson Boxberger LLP, Fort Wayne, Indiana, for Appellant. Patrick D. Quinn, Assistant United States Attorney, Dayton, Ohio, for Appellee. **ON BRIEF:** Kevin P. Podlaski, Diana Carol Bauer, Carson Boxberger LLP, Fort Wayne, Indiana, for Appellant. Patrick D. Quinn, Assistant United States Attorney, Dayton, Ohio, for Appellee.

Before MOORE and GILMAN, Circuit Judges; PHILLIPS, District Judge.*

OPINION

KAREN NELSON MOORE, Circuit Judge.

Plaintiff-Appellant Wayne G. Lovely appeals the order of the district court dismissing for lack of subject-matter jurisdiction Lovely's claim brought under the Federal Tort Claims Act ("FTCA"), 28

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* The Honorable Thomas W. Phillips, United States District Judge for the Eastern District of Tennessee, sitting by designation.

U.S.C. §§ 1346(b), 2671-2680. Lovely, a former student at the University of Dayton ("UD") and member of the Army Reserve Officers' Training Corps ("ROTC"), brought claims against Defendant-Appellee the United States of America and its agency, the United States Army ROTC Battalion at UD, for violation of Lovely's rights under the Privacy Act, 5 U.S.C. § 552a, and for intentional infliction of emotional distress ("IIED") under the FTCA. Lovely's claims were based on actions taken by Lovely's ROTC commander in relation to a UD disciplinary proceeding initiated against Lovely by another ROTC cadet. The district court dismissed Lovely's IIED claim under the *Feres* doctrine, which precludes claims brought under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152 (1950).[1] On appeal, Lovely argues that the district court erred in dismissing the IIED claim under *Feres* because Lovely was a UD student and not involved in any military activity at the time of his injury. For the reasons discussed below, we **AFFIRM** the judgment of the district court dismissing Lovely's IIED claim as barred by the *Feres* doctrine.

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[1] The district court also dismissed Lovely's Privacy Act claim on statute-of-limitations grounds. Because Lovely does not appeal the dismissal of his Privacy Act claim, we have no occasion to address that claim.

I. BACKGROUND

Beginning in August 2001, Lovely was a student at UD and an ROTC cadet with an ROTC scholarship to UD. In the summer of 2003, Lieutenant Colonel Versalle Washington became the Professor of Military Science and Chair of the Department of Military Science at UD. As Professor of Military Science, Washington was the ROTC Battalion Commander at UD, with responsibility for training cadets so that they may attain commission as Army officers. As Lovely's ROTC contract states, "the sole purpose of the ROTC scholarship program is to produce officers for the United States Army." Record on Appeal ("ROA") at 156 (Contract at 1). The contract sets forth the financial terms of Lovely's scholarship, under which the government agreed to pay Lovely's tuition, educational fees, and textbooks for three years, as well as a subsistence allowance and pay during certain periods. The contract also specifies that Lovely's education was to be completed in May 2005 and that Lovely agreed to "[r]emain a full-time student at [UD] until [receiving his] degree." ROA at 157 (Contract at 2). Lovely also agreed to "[m]aintain eligibility for enrollment in ROTC, enlistment in the USAR, and commissioning, as defined by statute, Army regulation, and this contract, throughout the period of this contract." *Id.* If Lovely failed to complete the educational requirements or other terms of the contract or committed misconduct, he could either be ordered to active duty or instead be required

to reimburse the United States for his educational costs paid under the contract.

In December 2003, Dr. Mark Ensalaco, Director of the Department of International Studies at UD, discovered that Lovely had plagiarized a research paper for one of Ensalaco's courses. At that time, Ensalaco orally told Washington of the plagiarism and offered to prepare for Washington a written statement about the plagiarism. It does not appear that Washington took Ensalaco up on the offer at that time.

In January 2004, a female cadet reported to Washington that Lovely had sexually assaulted her in September 2003. She declined to press criminal charges, but accepted Washington's recommendation that she see a counselor at UD's counseling center. Upon the advice of Dr. Carol Cummins-Collier at the counseling center, the female cadet decided to pursue proceedings against Lovely through the UD disciplinary board. A UD disciplinary-board hearing was scheduled for February 17, 2004. The female cadet asked Washington if he would testify for her at the hearing, but he declined. The female cadet, however, already knew of Lovely's plagiarism and asked Washington to obtain a statement about the plagiarism from Ensalaco so that she could use it at the hearing to discredit Lovely. Washington contacted Ensalaco and asked him to send Washington the previously offered statement. The day before the hearing, Ensalaco sent Washington an email describing the plagiarism incident, and Washington

then printed the email and gave a copy to the female cadet. The female cadet presented the statement to the UD disciplinary board at the February 17 hearing. After the hearing, Lovely asked Washington about the email, and Washington confirmed that he had requested the statement from Ensalaco and had given the email to the female cadet at her request. Lovely also asked Ensalaco how the female cadet received the document, and Ensalaco stated that he sent the email to Washington at Washington's request.

The board found that Lovely engaged "in non-consensual sexual intercourse" with the female cadet. ROA at 52 (Lovely Aff. 6/11/2004 at 5). The UD Judicial Review Committee denied Lovely's subsequent appeal, and he was suspended on March 8, 2005.

In his complaint, Lovely makes several allegations that Washington took other actions against Lovely in relation to the hearing. Lovely alleges that Washington told other ROTC cadets that Lovely had admitted at the hearing that he had sexually assaulted the female cadet. Lovely also alleges that Washington told other cadets that they should support the female cadet and that Washington intimidated one of Lovely's witnesses so that the witness did not testify at the hearing.

After the UD disciplinary proceedings, Washington initiated proceedings to remove Lovely from the ROTC program. Lovely claims that

Washington improperly inserted himself into these proceedings by, for example, rejecting the suggestion of the UD Dean of Students that disenrollment could be prevented and insisting on proceeding with disenrollment using UD's documents as supporting evidence. Lovely eventually was disenrolled from ROTC for misconduct, preventing any eligibility to re-enroll. Lovely also had to repay the ROTC scholarship money that he had been awarded.

Lovely filed a claim for damages with the Army, which was denied, primarily on the basis that *Feres* precluded Lovely, who was enlisted in the Army at the time of the alleged injury, from recovering for an injury incident to service. On June 9, 2006, Lovely filed a complaint in the United States District Court for the Southern District of Ohio asserting a claim based on violation of the Privacy Act. Lovely then filed an amended complaint on November 6, 2006, adding his IIED claim under the FTCA. The amended complaint alleged that Lovely suffered economic damages, including loss of his college funding and other earnings, and mental, emotional, and psychological damages, such as loss of reputation, depression, and humiliation. The government filed a motion to dismiss the Privacy Act claim, and later a motion to dismiss the IIED claim under Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, arguing that the district court lacked subject-matter jurisdiction due to the *Feres* doctrine and that Lovely's complaint failed to state a claim. On March 17, 2008, the district court entered a decision

granting the government's motion to dismiss both claims. The district court dismissed the IIED claim on the basis that the court lacked subject-matter jurisdiction as a result of the *Feres* doctrine because Lovely's alleged injuries arose out of or were in the course of activity incident to military service. Lovely now appeals the district court's dismissal of his IIED claim.

II. ANALYSIS

A. Standard of Review

"We review de novo a district court's determination of the applicability of the *Feres* doctrine." *Fleming v. United States Postal Serv.*, 186 F.3d 697, 698 (6th Cir.1999). Here, the district court dismissed Lovely's IIED claim for lack of subject-matter jurisdiction pursuant to the *Feres* doctrine.[2] "We

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[2] Neither party disputes that the *Feres* doctrine is jurisdictional in nature. Although the Supreme Court has not considered this question, at least six courts of appeals have specifically held that, because "[s]overeign immunity is a jurisdictional doctrine, . . . [t]he *Feres* doctrine, which limits the scope of the FTCA's waiver of sovereign immunity, is likewise jurisdictional." *Brown v. United States (Brown I)*, 151 F.3d 800, 803-04 (8th Cir.1998); *see also Schnitzer v. Harvey*, 389 F.3d 200, 202 (D.C.Cir.2004); *Jones v. United States*, 112 F.3d 299, 301 (7th Cir.1997); *Wake v. United States*, 89 F.3d 53, 57 (2d Cir.1996); *Atkinson v. United States*, 825 F.2d 202, 204 n. 2 (9th Cir.1987); *Stanley v. CIA*, 639 F.2d 1146, 1157 (5th Cir.1981). The Sixth Circuit likewise has treated the application of *Feres* as a jurisdictional question, although without explicitly so holding. *See, e.g., Brown v. United States (Brown II)*, 451 F.3d 411, 412,

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normally review de novo the district court's decision to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Howard v. Whitbeck*, 382 F.3d 633, 636 (6th Cir.2004). "Where the district court does not merely analyze the complaint on its face, but instead inquires into the factual predicates for jurisdiction, the decision on the Rule 12(b)(1) motion resolves a 'factual' challenge rather than a 'facial' challenge, and we review the district court's factual findings for clear error." *Id.; accord RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir.1996) ("Where a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court's factual findings unless they are clearly erroneous."). "However, review of the district court's *application of the law* to the facts is *de novo*." *RMI Titanium*, 78 F.3d at 1135. Even when the parties raise a "factual" challenge by submitting exhibits relating to subject-matter jurisdiction, we give deference to the district court only to the extent the district court actually made factual findings. *See Howard*, 382 F.3d at 636-37.

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416 (6th Cir.2006) (concluding that the district court had "no jurisdiction to award damages for the military's conduct related to [the injured serviceman] while he was on active duty" under the *Feres* doctrine). Because we review de novo the district court's application of the *Feres* doctrine regardless of whether it is a jurisdictional doctrine, we need not decide this question.

B. Application of the *Feres* Doctrine

With the Federal Tort Claims Act, Congress created a waiver of sovereign immunity under which the United States may be held liable for "tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see also* 28 U.S.C. § 1346(b)(1) (granting exclusive jurisdiction to the federal district courts "of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," subject to the procedures set forth in the FTCA).[3] The language

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[3] The intentional-torts exception to the FTCA states that the United States has not waived sovereign immunity for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). The government does not dispute that the FTCA applies to IIED claims generally, and we have not previously treated such claims as barred by the § 2680(h) exception. *See Mackey v. United States*, 226 F.3d 773, 775 n. 1 (6th Cir.2000) (applying *Feres* doctrine to dismiss IIED claim); *cf. Sabow v. United States*, 93 F.3d 1445, 1456 (9th Cir.1996) ("In determining whether a claim 'arises out of' one of the enumerated torts, we look beyond a plaintiff's classification of the cause of action to examine whether the conduct upon which the claim is based constitutes one of the torts listed in

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of the FTCA exempts from this waiver of immunity claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). In *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court significantly broadened this exception and created the *Feres* doctrine, pursuant to which "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. 153; *accord Fleming,* 186 F.3d at 699.

As this court previously noted, subsequent Supreme Court cases have further extended this doctrine:

> Review of these Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the

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§ 2680(h)."). Because we affirm the district court's dismissal of Lovely's claim as barred by the *Feres* doctrine, we do not consider whether § 2680(h) would bar Lovely's particular IIED claim.

> essential defense/combat purpose of the military activity from which it arose.

Major v. United States, 835 F.2d 641, 644-45 (6th Cir.1987). In the most recent Supreme Court case examining the *Feres* doctrine, the Court explained that "a service member is injured incident to service" if the injury is "because of his military relationship with the Government," *United States v. Johnson,* 481 U.S. 681, 689, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987), and reiterated the three broad rationales underlying the doctrine, *id.* at 689-90, 107 S.Ct. 2063; *see also United States v. Shearer,* 473 U.S. 52, 57, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985); *Stencel Aero Eng'g Corp. v. United States,* 431 U.S. 666, 671-72, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977). "First, '[t]he relationship between the Government and members of its armed forces is "distinctively federal in character."'" *Johnson,* 481 U.S. at 689, 107 S.Ct. 2063 (alteration in original) (quoting *Feres,* 340 U.S. at 143, 71 S.Ct. 153 (quoting *United States v. Standard Oil Co.,* 332 U.S. 301, 305, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947))). "Second, the existence of [] generous statutory disability and death benefits is an independent reason why the Feres doctrine bars suit for service-related injuries." *Id.* "Third, . . . suits brought by service members against the Government for injuries incurred incident to service . . . are the 'type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Id.* at 690,

107 S.Ct. 2063 (alteration in original) (quoting *Shearer*, 473 U.S. at 59, 105 S.Ct. 3039).

Although this is a close case presenting unique circumstances that do not fall directly in line with other cases applying the *Feres* doctrine, we conclude, in light of the doctrine's rationales and the courts' broad interpretation of the doctrine, that the district court properly dismissed Lovely's IIED claim as barred by the *Feres* doctrine. Initially, Lovely argues that his claims are not subject to the *Feres* doctrine because he was not on active duty or subject to military command or discipline while attending classes at UD or while involved in the UD disciplinary proceedings. We have noted, however, that "the *Feres* doctrine extends beyond situations where the soldier is acting pursuant to orders or while subject to direct military command or discipline." *Sidley v. United States*, 861 F.2d 988, 990 (6th Cir.1988); *accord Skees v. United States*, 107 F.3d 421, 423 (6th Cir.1997) ("[T]he term 'incident to service' . . . is not a term limited to military training and combat.").

As an ROTC cadet, Lovely was enlisted in the Army and was therefore a member of the armed forces, even if not on active duty. Although we have not yet considered the *Feres* doctrine as applied to claims brought by ROTC cadets, both the Eighth and the Second Circuits have done so, concluding that the doctrine applied when the ROTC cadet's injuries occurred in the course of activity incident to military service. *See Brown v. United States (Brown I)*, 151

F.3d 800, 805 (8th Cir.1998) (concluding that the *Feres* doctrine barred ROTC cadet's medical-negligence claim against Army physicians who initially treated an injury the cadet sustained during required ROTC activities); *Wake v. United States,* 89 F.3d 53, 58-59 (2d Cir.1996) (concluding that *Feres* doctrine barred claim of ROTC cadet injured in a car accident while returning from a required physical examination even though "as a member of the NROTC and as an enlisted, inactive member of the Navy Reserves she lacked an official military status at the time of the accident"). Moreover, the Tenth Circuit, in an unpublished opinion, upheld the district court's dismissal under the *Feres* doctrine of the sexual-harassment claims of two ROTC cadets even though the cadets were not on active duty. *Morse v. West,* No. 97-1386, 1999 WL 11287, at *4 (10th Cir. Jan. 13, 1999). We agree and conclude that Lovely's inactive status as an ROTC cadet does not preclude his claims from being subject to the *Feres* doctrine.

Lovely next argues that his injury did not arise from an activity incident to military service but instead from his activities as a UD student attending a UD disciplinary proceeding, activities which Lovely claims are "distinctly non-military." Lovely Br. at 15. We conclude, however, that application of the *Feres* doctrine to Lovely's claim is supported by the third rationale stated in *Johnson,* because Lovely's injuries stemmed from the manner in which his commanding officer chose to conduct the affairs and discipline of his ROTC battalion. *See Shearer,* 473 U.S. at 57, 105

S.Ct. 3039 (noting that the *Feres* doctrine is best explained in part by "the peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline" (internal quotation marks omitted)).[4]

Lovely's complaint alleges that he suffered economic as well as mental, emotional, and psychological injuries when Washington released the Ensalaco email to a fellow cadet, made false statements about Lovely to other UD students, wrongfully interfered with the UD disciplinary board and the ROTC disenrollment proceedings, and intimidated Lovely's witness prior to the UD proceedings.[5] Lovely's

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[4] Although Lovely does not discuss his claims in light of the other two rationales behind the *Feres* doctrine, we note that one of the rationales, the availability of alternative compensation systems for servicemen, is not implicated here. Most cases under the *Feres* doctrine have arisen from physical injuries or death due to alleged negligence on the part of the United States. *See, e.g., Johnson*, 481 U.S. at 683, 107 S.Ct. 2063 (serviceman died during a rescue mission allegedly because of helicopter pilot's negligence). In such cases, the serviceman or his or her family may be entitled to statutory benefits from the death or injury. *See, e.g., id.* at 691, 107 S.Ct. 2063. As long as Lovely's injury arose from activity incident to service, however, this factor is not dispositive. *See Sidley*, 861 F.2d at 991 ("While the existence of an alternate compensation system, such as the [Veterans Benefit Act], makes the sometimes harsh effect of the *Feres* doctrine more palatable, the denial or unavailability of these benefits does not affect the applicability of the *Feres* doctrine.").

[5] Finding no factual support for the allegations that Washington intimidated Lovely's witness or exerted unlawful influence over the UD proceedings, the district court refused to consider these allegations. Even if, however, we accept the

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injuries, such as loss of his college funding and loss of his reputation, would not have occurred had Lovely not been an ROTC cadet under Washington's command and therefore arose "because of his military relationship with the Government." *Johnson,* 481 U.S. at 689, 107 S.Ct. 2063. All of the students involved in these incidents were ROTC cadets. Washington would not have been offered or have been able to obtain the email from Ensalaco had he not been Lovely's commanding officer. Similarly, Washington would not have had any involvement in Lovely's UD disciplinary hearing had he not been Lovely's ROTC commanding officer. To the extent Lovely alleges that Washington interfered in the ROTC disenrollment process, this injury even more clearly would seem to arise from an activity incident to military service. Overall, as the district court noted, "[f]or the Court to question LtC. Washington's interactions with the cadets assigned to his ROTC unit would involve the Court in just the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the *Feres* doctrine cautions against." Dist. Ct. Op. at 36 (citing *Brown v. United States (Brown III),* 462 F.3d 609, 614-15 (6th Cir.2006)).

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statements in Lovely's affidavits as true, these allegations would actually support the application of the *Feres* doctrine, as they concern Washington's conduct of the ROTC program and his relationship with other ROTC cadets.

The structure of the ROTC program also supports the conclusion that Lovely was engaged in activity incident to service. As the district court explains in detail, attendance at UD was a requirement of Lovely's ROTC contract, and Lovely received an ROTC scholarship to attend UD in exchange for his performance under the contract. *See Wake,* 89 F.3d at 58 ("Also relevant is whether the activity is limited to military personnel and whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service."). Washington's job as ROTC Commander was to screen cadets as candidates for commissioning as Army officers. Washington's treatment of Lovely, even if tortious, was an exercise of military discipline. Lovely argues that his injuries could not have arisen incident to service because they arose "because of Washington's deviation from his military obligations." Lovely Br. at 18. A primary rationale behind the *Feres* doctrine, however, is that this very question is for the military, not the courts, to decide. Lovely cannot escape the application of *Feres* simply by alleging that Washington improperly exercised his authority over Lovely and the other cadets. *See Mackey v. United States,* 226 F.3d 773, 776 (6th Cir.2000) (concluding that plaintiff's sexual-harassment claims were barred by *Feres* and rejecting plaintiff's argument "that her claims do not implicate issues of judgment, discretion, or command because the activities she complains of 'simply cannot be viewed as acceptable in any fashion'"). Lovely's injuries stemmed directly from the disciplinary decisions of

his commanding officer. Although Lovely is correct that he was engaged in the activity of attending school, he also was engaged in the activity of serving as an ROTC cadet and an ROTC scholarship student. The two are not mutually exclusive.

III. CONCLUSION

Because we conclude that the injuries underlying Lovely's claim arose from activity incident to his military service, we **AFFIRM** the judgment of the district court dismissing Lovely's IIED claim as barred by the *Feres* doctrine.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WAYNE G. LOVELY,	:	
Plaintiff,	:	Case No. 3:06cv169
vs.	:	JUDGE WALTER HERBERT RICE
THE UNITED STATES OF AMERICA,	:	(Filed Mar. 17, 2008)
Defendant.	:	

DECISION AND ENTRY SUSTAINING DEFENDANT'S MOTION TO DISMISS (DOC. #19) AND OVERRULING, AS MOOT, PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS (DOC. #30); JUDGMENT TO ENTER IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF; INSTRUCTIONS TO COUNSEL; TERMINATION ENTRY

The Plaintiff, Wayne G. Lovely, a former student at the University of Dayton ("U.D." or "University") and member of the Reserve Officer Training Corps ("ROTC"), brings suit against the United States and its agency, the United States Army ROTC Battalion, at the University of Dayton. Doc. #1 (Compl.). The original Complaint alleged that the United States violated Lovely's rights, under the Privacy Act (5 U.S.C. § 552a) and Army Regulation 340-21, by releasing a copy of an e-mail regarding Lovely to a third party. *Id.* at 1. Lovely requested compensatory

damages, costs and fees, and all other equitable relief to which he was entitled. *Id.* at 4. Subsequently, the Court granted Lovely leave to file an Amended Complaint, in which he reiterated his Privacy Act claim and added thereto a claim for intentional infliction of emotional distress, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, claiming that the Government "wrongfully and intentionally inflicted emotional distress upon Lovely by releasing the [aforementioned e-mail], making false statements about Lovely to U.D. students, wrongfully interfering with the U.D. non-academic disciplinary board and ROTC disenrollment hearings . . . and intimidating Lovely's intended witnesses before these proceedings." Doc. #16 ¶ 21. Lovely's prayer for relief, in his Amended Complaint, mirrored that of his original Complaint. *Id.* at 6.

Currently pending before the Court are the Motion to Dismiss (Doc. #19) of the United States[1] and Lovely's Motion to Compel Discovery and for Sanctions (Doc. #30). The Court will address each Motion in turn.

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[1] The Defendant previously filed a Motion to Dismiss, at Docket #7. In response to the Plaintiff filing an Amended Complaint, the Defendant filed a Second Motion to Dismiss at Docket #19, which incorporates its briefings on its earlier Motion. Thereafter, the Court overruled the Defendant's original Motion to Dismiss, without prejudice, given that the second Motion superseded the first such. Doc. #26. In ruling on the Defendant's Motion to Dismiss herein, the Court will consider the parties' briefings on both of the Motions to Dismiss.

I. FACTS

A. General Facts

The Plaintiff, Wayne G. Lovely, Jr., was a student at the University of Dayton and an ROTC scholarship cadet, at the time of the incidents in question. Doc. #7, Attach. #1 (2004 Lovely Aff.). Just prior to the beginning of Lovely's junior year, in the summer of 2003, Lieutenant Colonel Versalle Washington ("LtC. Washington") became the Professor of Military Science ("PMS") and Director of the Department of Military Science, at the University of Dayton. Doc. #7, Attach. #3 (Washington Aff.) at 1. As such, he was a full professor on the faculty at the University, as well as being an active duty Army officer. *Id.*

In December 2003, Dr. Mark Ensalaco, the Director of the Department of International Studies, discovered that Lovely had plagiarized a research paper that accounted for one-half of his grade, in Dr. Ensalaco's course. *Id.*; Doc. #10, Ex. K7 (Ensalaco E-mail to Washington, dtd. Feb. 16, 2004).[2] In

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[2] The Plaintiff filed all of the exhibits to Docket #10 (Plaintiff's Response to the Defendant's original Motion to Dismiss) manually with the Court.

Like many other documents contained in the record, in this case, this e-mail from Dr. Ensalaco to LtC. Washington is not authenticated. Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. Specific instructions are given to Defendant, at the conclusion of this Decision, however, regarding placing this evidence in proper Rule 56 form. Failure to comply will cause this Court to vacate its ruling herein.

accordance with University policy, Lovely received a failing grade for the course, due to the plagiarism. Doc. #10, Ex. K7. Shortly thereafter, Dr. Ensalaco verbally informed LtC. Washington of the plagiarism incident. *Id.*; Doc. #7, Attach. #3 at 1. Dr. Ensalaco then offered to prepare a statement concerning the incident, if LtC. Washington would find it useful. Doc. #7, Attach. #3 at 1.

The following month, a female ROTC cadet reported to LtC. Washington that Lovely had sexually assaulted her, alleging that the incident had occurred four months earlier, in September 2003. Doc. #16, Ex. B (Washington E-mail to Col. Garcia, dtd. June 18, 2004).[3] LtC. Washington suggested that she contact the police, but she declined. Doc. #7, Attach. #3 at 2. LtC. Washington then advised her to go to the University counseling center, which she did. *Id.* At the advice of a counselor at the counseling center, the female cadet pursued University disciplinary proceedings against Lovely. *Id.* The University scheduled a disciplinary board hearing for February 17, 2004. Doc. #7, Attach. #1 (2004 Lovely Aff.) at 4.

Prior to the sexual assault disciplinary hearing, the female cadet approached LtC. Washington. She was aware of Lovely's plagiarism incident through

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[3] This e-mail from LtC. Washington to Col. Garcia is not authenticated. Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. *But see supra* note 2.

other means and asked LtC. Washington if he could get a statement from Dr. Ensalaco about it. Doc. #7, Attach. #3 at 2. LtC. Washington contacted Dr. Ensalaco and reminded him of his previous offer of a written statement regarding Lovely's plagiarism, to which Dr. Ensalaco responded by sending an e-mail describing the events in question.[4] *Id.* at 1-2. LtC.

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[4] The text of the e-mail from Dr. Ensalaco to LtC. Washington reads as follows:

> As per your request, I am writing in regards to Mr. Wayne Lovely who is registered as an International Studies major (Latin American concentration). As I informed you at the end of the fall semester, I assigned Mr. Lovely a failing grade ("F") for my course, United States-Latin American Relations (POL 404), for the fall term. I assigned the failing grade after I discovered Mr. Lovely had plagiarized a research paper. According to the course syllabus, the final paper counted towards 50 percent of the final grade. The failing grade for the paper resulted in a failing grade for the course.
>
> I should mention also that during a meeting in my office in early January, Mr. Lovely admitted to having plagiarized a paper which he found on the Internet. (I had suspected plagiarism in the case, and found the article independently on the Internet.) Mr. Lovely admitted to this after he had received notification of the failing grade in the course. During the meeting, Mr. Lovely made an effort to explain his action but to my consternation, he made no effort to apologize for conduct that violated university policy with regard to academic honesty. I took the lack of remorse to be troubling.
>
> As director of the International Studies program, I explained to Mr. Lovely that by failing the course it was unlikely that he would be able to graduate with a

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Washington printed the e-mail and gave a copy to the female cadet. *Id.* This action is the crux of Lovely's Privacy Act claim.

The female cadet presented the copy of the e-mail at the University disciplinary hearing regarding the alleged sexual assault, held on February 17, 2004, in Lovely's presence. Doc. #7, Attach. #1 at 4.[5] At the conclusion of the hearing, the Board voted to suspend Lovely from all University activities, until May 2005. *Id.* at 5; Doc. #10, Ex. K8 (Ltr. from University of Dayton to LtC. Washington, dtd. Mar. 18, 2004).[6]

The morning after the hearing, Lovely approached LtC. Washington about the e-mail the

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> degree in International Studies with a concentration in Latin America, because POL 404 is required for all INS-Latin American concentrators.
>
> Should you require any further information please do not hesitate to contact me at [xxxx].

Doc. #10, Ex. K7.

[5] According to Lovely's affidavit testimony, "[a]t the very end of the board hearing as the members were leaving [the female cadet] handed out a document which was assumed to be a summation of her argument[, but instead the] document was an e-mail pertaining to my plagiarism incident. It had been written by Dr. Mark Ensalaco, the professor who taught the class in which I plagiarized, and addressed to LtC. Washington." Doc. #7, Attach. #1 at 4.

[6] This letter from Mary Sue Hufnagle, Assistant Dean of Students, University of Dayton, to LtC. Washington is not authenticated. Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. *But see supra* note 2.

female cadet had presented at the hearing. Doc. #7, Attach. #1 at 4. LtC. Washington acknowledged giving the e-mail to the other cadet. *Id.*[7] In later correspondence about this issue, LtC. Washington stated that he gave her the e-mail at the recommendation of her counselor, who told LtC. Washington that the e-mail "might be useful to address [Lovely's] character" at the upcoming disciplinary hearing. Doc. #16, Ex. B (Washington E-mail to Col. Garcia).

Six days later, on February 24, 2004, Lovely confronted Dr. Ensalaco about the e-mail. Doc. #7, Attach. #1 at 5. Dr. Ensalaco acknowledged sending the e-mail to LtC. Washington. *Id.* He told Lovely that LtC. Washington had asked for it for "records purposes" and never mentioned that it would be used for a University disciplinary board hearing. *Id.*

The following month, Lovely talked to several fellow cadets about the happenings surrounding the University hearing. Lovely states that these cadets told him that LtC. Washington told other cadets that Lovely had admitted to sexually assaulting the female cadet, at the hearing, which was not true. Doc. #10, Ex. B at 2 (2006 Lovely Aff.). Furthermore, Lovely states that LtC. Washington said he learned of this admission by listening to tapes from the hearing,

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[7] Specifically, Lovely's affidavit reads, "[u]pon learning of the e-mail, I immediately went to speak with LtC. Washington on 18 February at approximately 0845 hours. I asked him how [the female cadet] obtained the document. He verified that he gave it to her." Doc. #7, Attach. #1 at 4.

which University personnel say did not happen. *Id.* LtC. Washington also seemingly told other cadets that they should support the female cadet in this situation, rather than Lovely. *Id.*

Eventually, on October 7, 2005, the United States Army disenrolled Lovely from ROTC. Doc. #7, Attach. #1 at 6-7; Doc. #10, Ex. Q (Dept. of Army Memo., dtd. Oct. 7, 2005).[8] During the disenrollenment process, Lovely requested a copy of the Ensalaco e-mail, on April 12, 2005, along with other documents associated with that process. Doc. #10, Ex. 1 at 2 (Ltr. from Atty. Podlaski to Col. Frusha, dtd. Apr. 12, 2005).[9] After initially not complying with the request, the Government finally released some of the records, on July 12, 2005, to include the subject e-mail and a letter from LtC. Washington to Col. Garcia (which Lovely will later assert demonstrates LtC. Washington's willfulness in disclosing the subject e-mail). Doc. #10, Ex. M (Fax from Command Judge Adv. to Atty. Podlaski, dtd. July 12, 2005).[10]

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[8] This memorandum from the Department of the Army is not authenticated. Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. *But see supra* note 2.

[9] This letter from Lovely's legal counsel, Kevin P. Podlaski, to Col. Robert J. Frusha is not authenticated. Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. *But see supra* note 2.

[10] The facsimile from the Command Judge Advocate to Lovely's legal counsel, Kevin P. Podlaski is not authenticated.

(Continued on following page)

On December 15, 2005, Lovely filed a claim against the United States Army, alleging, among other things, a violation of the Privacy Act and intentional infliction of emotional distress. Doc. #10, Ex. R (Ltr. from Atty. Podlaski to Armor Ctr. Cmdr., dtd. Dec. 15, 2005 & SF 95).[11] The Army denied the claim on December 21, 2005. Doc. #10, Ex. S (Ltr. from Staff Judge Adv. to Atty. Podlaski, dtd. Dec. 21, 2005).[12] Lovely then filed the subject litigation, on June 9, 2006. Doc. #1.

B. Lovely's ROTC Contract

Lovely's Army Senior Reserve Officers' Training Corps (ROTC) Scholarship Cadet Contract ("ROTC Contract") is included in the record as Attachment #1 to the Defendant's Motion to Dismiss. Doc. #19,

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Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. *But see supra* note 2.

[11] The letter from Lovely's legal counsel, Kevin P. Podlaski, to the Commander, United States Army Armor Center at Fort Knox and accompanying Standard Form 95, is not authenticated. Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. *But see supra* note 2.

[12] The letter the Office of the Staff Judge Advocate to Lovely's legal counsel, Kevin P. Podlaski is not authenticated. Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. *But see supra* note 2.

Attach. #1 (ROTC Contract, dtd. Aug. 26, 2002).[13] Pertinent to the issues at hand are the following details of that Contract:

- The preamble's statement that "the sole purpose of the ROTC scholarship program is to produce officers for the United States Army." *Id.* at 1.
- The date Lovely's education is to commence – August 26, 2002; the date his education is to be completed – May 2005. *Id.*
- Lovely's agreement to "[r]emain a full-time student at the [University of Dayton] until I receive my degree." *Id.* at 2 ¶ 1c.
- Lovely's agreement to "[m]aintain eligibility for enrollment in ROTC, enlistment in the USAR, and commissioning, as defined by statute, Army regulation, and this contract, throughout the period of this contract. . . ." *Id.* ¶ 1i
- An expression of understanding that if Lovely is disenrolled from the ROTC program for, among other things, "failing to complete the educational requirements specified in this agreement or other educational requirements for ROTC cadets as specified in Army Regulations, incorporated herein by reference" or "misconduct," that the Army

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[13] This ROTC Contract is not authenticated. Since there is no dispute between the parties as to the contents of this document, the Court will rely upon it, in ruling on the issues presented here. *But see supra* note 2.

> may order him to active duty as an enlisted soldier or require him to reimburse the Government for his educational costs. *Id.* at 6 ¶ 7.

The ROTC Contract also sets forth the financial terms of the Contract, to include the Government's agreement to pay, for three years, Lovely's tuition, educational fees, textbooks, a subsistence allowance, and pay, during certain periods. *Id.* at 9.

II. RULE 12(b)(1) MOTION TO DISMISS STANDARD

When a defendant moves to dismiss on grounds of lack of subject matter jurisdiction, "the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003) (quoting *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990)). This Court has previously recognized that the procedural framework for ruling on a motion to dismiss for lack of subject matter jurisdiction, brought under Federal Rule of Civil Procedure 12(b)(1), is as follows:

> Rule 12(b)(1) motions to dismiss based upon subject matter jurisdiction generally come in two varieties. A facial attack on the subject matter jurisdiction alleged by the complaint merely questions the sufficiency of the pleading. In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss.

> On the other hand, when a court reviews a complaint under a factual attack, . . . no presumptive truthfulness applies to the factual allegations. Such a factual attack on subject matter jurisdiction commonly has been referred to as a "speaking motion."

McGuire v. Ameritech Servs., 253 F. Supp. 2d 988, 993-94 (S.D. Ohio 2003) (quoting *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)); Fed. R. Civ. P. 12(b)(1). Courts may consider facts outside the pleadings, in ruling on a factual attack 12(b)(1) motion. Courts do not, however, convert Rule 12(b)(1) motions into motions for summary judgment, "as facts which bear on jurisdiction are not the same as facts which bear on the merits." *McGuire*, 253 F. Supp. 2d at 994.

III. ANALYSIS

The United States moves to dismiss both the Privacy Act claim and the Plaintiff's claim under the FTCA, asserting that this Court lacks subject matter jurisdiction, as to both claims. Specific to the Privacy Act claim, the Government argues, among other things, that the Plaintiff's claim is time-barred since he did not file it within the statutorily required time frame. Doc. #7. The Court finds this argument to be dispositive, so it will not address the remaining

arguments, on this claim.[14] With regard to the Plaintiff's claim of intentional infliction of emotional distress, under the FTCA, the Government argues, and the Court agrees, that the claim is barred by the *Feres* doctrine. Doc. #19. The Court will address these arguments in turn.

A. Privacy Act Claim

The Plaintiff brings suit for a violation of the Privacy Act, claiming that LtC. Washington's release, to the female cadet, of his e-mail from Dr. Ensalaco violates the Privacy's [sic] Act prohibition on disclosing a record that is contained in a system of records, without the prior written consent of the individual to whom the record pertains. Doc. #16 (Am. Compl.) at ¶ 17; 5 U.S.C. § 552a(b), (g)(1)(D).

Specifically, the Plaintiff alleges that, by giving the female cadet a copy of the subject e-mail, LtC. Washington wrongfully disclosed a record, in violation of 5 U.S.C. § 552a(b). *See* Doc. #16 (Compl.) ¶ 17. That Section provides that

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[14] The Defendant also argues that the Privacy Act claim should be dismissed because it does not comport with the following requirements of that Act: the document in question (the e-mail from Dr. Ensalaco to LtC. Washington) is not a "record contained within a system of records," the Complaint does not seek actual damages and the Complaint fails to name a proper party. Doc. #7 (Original Mot. to Dismiss) at 9-14.

> [n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. . . .

5 U.S.C. § 552a(b). This language is followed by certain delineated exceptions, none of which are applicable in this case. *Id.* Paragraph (g)(1), of the Privacy Act, further provides that an individual may bring a civil action against an agency, for a violation of this provision, and the United States district courts shall have jurisdiction over any such actions. 5 U.S.C. § 552a(g)(1)(D).

The Privacy Act also contains a statute of limitations, which reads, in pertinent part, as follows:

> An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides . . . , *within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section*, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. . . .

5 U.S.C. § 552a(g)(5) (emphasis added). Thus, a plaintiff must bring a Privacy Act claim within two years from the date on which the cause of action arises. *Id.*; *see also Cannon-Harper v. United States Postmaster Gen.*, 2006 U.S. Dist. LEXIS 66981, *6 (E.D. Mich. Sept. 19, 2006) (noting that a cause of action is considered to have arisen, in a 5 U.S.C. § 552a(b) wrongful disclosure case, when the plaintiff knows or has reason to know of the alleged violation) (citing *Tijerina v. Walters*, 821 F.2d 789, 798 (D.C. Cir. 1987)).[15] An exception to the rule occurs, however, under the following conditions: (1) when an agency has materially and willfully misrepresented any information required, under the Privacy Act, to be disclosed to an individual, and (2) when the information so misrepresented is material to the establishment of the agency's liability to the individual, under the Privacy Act. 5 U.S.C. § 552a(g)(5). If the exception applies, the action must be brought within two years after the individual discovers the misrepresentation. *Id.*[16]

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[15] Contrast *Edwards v. Horner*, which applies a slightly different standard in the context of a denial of a request to amend records, under 5 U.S.C. § 552a(d)(2). 1991 U.S. App. LEXIS 15963 (6th Cir. July 11, 1991). In these cases, a cause of action arise [sic] "when the agency issues a final decision on the matter and when a person knows or has reason to know that the request has been denied." *Id.* at *11.

[16] The Ninth Circuit summarizes the rule and its exception as follows:

> In general then, an individual must bring suit within two years of the unauthorized disclosure except where

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The Defendant argues that the Plaintiff's Privacy Act claim is barred by the Act's two-year statute of limitations, because the Plaintiff "knew or should have known" of the violation, on or about February 17, 2004, which was the day of the disciplinary hearing, but he did not file this action until June 9, 2006 – almost four months too late. Doc. #7 (Original Mot. to Dismiss) at 6-9; Doc. #13 (Second Mot. to Dismiss) at 1-5. The Plaintiff responds with the following arguments: (1) the statutory period did not begin to run on February 17, 2004, because the Government "materially and willfully misrepresented" certain information required to be disclosed; (2) the statutory period did not begin to run until the Plaintiff suffered "adverse effects" when he was officially disenrolled by the Army; and (3) the statutory period was tolled while the Plaintiff exhausted his administrative remedies. Doc. #10 at 8-15. The Court will address these three arguments in turn, after first taking note that the Court lacks jurisdiction, under the Privacy Act, if the Plaintiff did not bring his action within the statutory parameters of 5 U.S.C. § 552a(g)(5). *Davis v. Gross*, 1984 U.S.

> an agency has willfully misrepresented information required to be disclosed to the individual and which would be material to establishing the agency's liability under the Privacy Act; in such exceptional circumstances, § 552a(g)(5) affords the individual two years from the time he discovers the agency's actions.

Oja v. United States Army Corps of Eng'rs, 440 F.3d 1122, 1128 (9th Cir. 2006).

App. LEXIS 14279, *4 (6th Cir. 1984); *see also Akutowicz v. United States*, 859 F.2d 1122, 1126 (2d Cir. 1988) ("[W]here the government's consent as sovereign to be sued is conditioned upon the filing of suit within a specified period of time, strict compliance with that condition is a jurisdictional prerequisite.") (internal quotations omitted); *Cannon-Harper v. United States Postmaster Gen.*, 2006 U.S. Dist. LEXIS 75313, **3-4 (E.D. Mich. Oct. 17, 2006) (same principle).

1. Willful Misrepresentation of Information Required to be Disclosed

The Plaintiff argues the "material and willful misrepresentation" exception to the two-year statute of limitations, based on the fact that the Government was dilatory in sending him two requested documents – the e-mail at issue and a copy of a letter from LtC. Washington to Col. Garcia (which allegedly demonstrates LtC. Washington's willfulness in disclosing the subject e-mail).[17] Doc. #10 at 8-12; *see also id.* at 11 (noting that Lovely submitted his request for these documents on April 12, 2005, but did not receive the same until three months later). The Plaintiff goes on to argue that "[b]y refusing to produce these documents[,] the Government materially misrepresented

[17] In order to be awarded damages in a wrongful disclosure Privacy Act suit, a plaintiff must demonstrate that an agency acted "in a manner which was intentional or willful." 5 U.S.C. § 552(g)(4).

their existence." *Id.* at 11.[18] In support of this argument, the Plaintiff cites four cases, all from the Federal District Court of the District of Columbia, for the proposition that the Privacy Act limitations period may be tolled when a plaintiff "despite all due diligence is unable to obtain vital information bearing on the existence of his claim." *Id.* at 8-9 (quoting *Levant v. Roche*, 384 F. Supp. 2d 262, 270 (D.D.C. 2005) and citing *Lacey v. United States*, 74 F. Supp. 2d 13 (D.D.C. 1999); *Marin v. United States Dept. of Def.*, 1998 WL 779101 (D.D.C. Oct. 23, 1998); *Pope v. Bond*, 641 F. Supp. 489 (D.D.C. 1986)).

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[18] Although the Court finds it unnecessary to decide this issue, since it finds that possession of the documents was not material to the establishment of the Defendant's liability, it is leery of adopting the Plaintiff's proposition that the Government "materially misrepresented the existence of the documents" by refusing to produce them. First and foremost, the Court notes that there is no doubt that the e-mail, which is the subject of this litigation, existed. The Plaintiff saw the e-mail at the hearing (although it is unclear whether he actually read it) and spoke to both LtC. Washington and Dr. Ensalaco about it shortly thereafter. Further, withholding a document, of which a plaintiff knows its existence and knows, at least generally, of its contents, is not the type of "material and willful misrepresentation" found by other courts to be violative of 5 U.S.C. § 552a(g)(5). *E.g., Lacey v. United States*, 74 F. Supp. 2d 13, 10-17 (D.D.C. 1999) (over the course of a year, government agent repeatedly advised plaintiffs not to sue, telling them they lacked evidence to bring suit and that they should wait for the agency to finish its investigation); *Jarrell v. United States Postal Service*, 1985 U.S. App. LEXIS 27521, **11-12 (D.C. Cir. 1985) (agency had excised certain parts of documents and the plaintiff had no knowledge of the excised information).

The Defendant counters by pointing out that, on or about February 17, 2004 (the date of the Plaintiff's University disciplinary hearing), the Plaintiff knew of the contents of the e-mail and knew that LtC. Washington had willfully disclosed the same to the female cadet, based on the Plaintiff's attendance at the hearing and his confrontations with both LtC. Washington and Dr. Ensalaco, within days after the hearing. Doc. #13 at 3. In effect, the Defendant argues that the Government's transmittal of the two documents to the Plaintiff was not "material to the establishment of the liability of the agency to the [Plaintiff]," as required by the Privacy Act and, thus, the "material and willful" exception to the statute of limitations is inapplicable. *Id.* The Court agrees.

The Plaintiff in this case admittedly knew that LtC. Washington had intentionally given the female cadet the subject e-mail on or about February 17, 2004, because he witnessed her in possession of the e-mail and because LtC. Washington apprised him of both the disclosure and the intentional nature of the disclosure of the same the next day. Doc. #7, Attach. #1 (2004 Lovely Aff.) at 4-5. Thus, the Plaintiff's actual possession of the e-mail was not "material to the establishment of the agency's liability to the individual, under the Privacy Act," as required for the statute of limitations exception under 5 U.S.C. § 552a(g)(5). *Accord Bowyer v. United States Dep't of Air Force*, 875 F.2d 632, 636 (7th Cir. 1989) (in suit alleging improper maintenance of records, "the relevant fact is not when the plaintiff first had physical

possession of the particular records, but rather when he first knew of the existence of the records. For this purpose, even unsubstantiated hearsay and rumors are enough to find knowledge sufficient to trigger the statute of limitations") (internal quotations omitted); *Nwangoro v. Department of the Army*, 952 F. Supp. 394, 397 (N.D. Tex. 1996) ("A cause of action accrues once the plaintiff knows or has reason to know of the adverse action. Thus, the limitations period commences not when the plaintiff first obtains possession of the particular records at issue, but rather when he first knew of their existence.") (citing *Rose v. United States*, 905 F.2d 1257, 1259 (9th Cir. 1990) and *Bowyer*, 875 F.2d at 637). Thus, even assuming that this Court was in agreement with the cited cases from the District Court of the District of Columbia, the proposition propounded therein (that the Privacy Act limitations period may be tolled when a plaintiff, "despite all due diligence is unable to obtain vital information bearing on the existence of his claim") is inapposite here, because the possession of the e-mail was not "vital information bearing on the existence of his claim," since the Plaintiff already knew of the disclosure of the contents of the subject document, as well as the intentionality of the same.[19]

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[19] Besides the inapplicability to the facts of this case, the holdings in the cited cases are also inapposite for various other factual and legal reasons. *E.g.*, *Levant v. Roche*, 384 F. Supp. 2d 262, 270 (D.D.C. 2005) (which recited the quoted proposition, but did not apply it; finding that the plaintiff was not deprived of a reasonable time in which to file suit so his claims were

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Even assuming, arguendo, that the Defendant's withholding of the requested documents could be framed as being material to the establishment of the Defendant's liability, the time period between his request and receipt of the same was only three months (April 12 – July 12, 2005). Therefore, the statutory period would only have been tolled for three months. However, the Plaintiff was almost four months late in filing his Complaint, in that he had all the facts necessary to "know or have reason to know" of the Privacy Act violation on the day after the disciplinary hearing, February 18, 2004, when LtC.

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time-barred); *Lacey v. United States*, 74 F. Supp. 2d 13, 16 (D.D.C. 1999) (finding the plaintiffs' claims were not time barred, but not because they had been unable to obtain vital information, but because the government made "material and willful misrepresentations to [them]" by, for example, advising them not to sue, telling them they lacked evidence to bring a suit and advising them to wait for the INS to finish its investigation before bringing a suit); *Marin v. United States Dept. of Def.*, 1998 WL 779101, *2 (D.D.C. Oct. 23, 19998 [sic]) (not addressing plaintiff's inability to obtain information, but, instead, plaintiff's allegations of the government's deliberate alteration of his records after the statute began to run, which triggered the material and willful tolling provision); *Pope v. Bond*, 641 F. Supp. 489, 499-500 (D.D.C. 1986) (finding that the statute of limitations had not run, in part, because "plaintiff's specific requests for access to the FAA files containing the evidence of violations [were] repeatedly denied by the FAA," but this case is differentiated from the present case, because the *Pope* plaintiff was not aware of the existence of, or the disclosure of, some of the files in question until discovery, when the FAA was forced to turn over the files it had previously refused to turn over and, therefore, did not know or have reason to know of the Privacy Act violation until such time).

Washington confirmed that he had given the subject e-mail to the female cadet.

In sum, then, the Court is not persuaded that the two year statute of limitations was tolled by the Defendant's failure to directly produce the requested documents. Even assuming, arguendo, that it was so tolled, however, the Plaintiff was still late in initiating the present litigation. Thus, the Court will turn to the Plaintiff's next argument in opposition to the Defendant's statute of limitations challenge.

2. Statutory Period did not Begin until Plaintiff Suffered "Adverse Effects"

The Plaintiff next argues that the statutory period did not begin to run until the Army disenrolled him, on October 7, 2005, because it was then that he suffered "adverse effects" from the Privacy Act violation. Doc. #10 at 12-13. In so arguing, the Plaintiff asserts that "[a] claim for unlawful disclosure of information under the Privacy Act, § 552a(g)(5), does not accrue for statute of limitation purposes until a claim for damages is substantiated." Doc. #10 at 12 (citing *Lacy v. United States*, 74 F. Supp. 2d 13 (D.D.C. 1999) and *Marin v. United States*, 1998 WL 779101 (D.D.C. 1998)).

The Plaintiff's argument here is not well taken. First, because the two cited cases from the District Court for the District of Columbia do not support the Plaintiff's contention that, as a blanket rule, the Privacy Act statutory period does not start until a

plaintiff suffers "adverse effects" from a violation. *Lacy*, 74 F. Supp. 2d at 16-27 (statutory period didn't start until claim had been substantiated, but only because, in the meantime, the Government had repeatedly advised the plaintiffs that their claim was insufficient and they should not bring suit); *Marin*, 1998 WL 779101 at *2 (pinning start of statute of limitations on date on which the "injury for which relief is sought was triggered," which was not the same as the date on which the claim for damages was substantiated). Furthermore, and most importantly, however, the Privacy Act quite clearly spells out when the statutory period runs and when it is tolled, in 5 U.S.C. § 552a(g)(5), but does not include a tolling period pending an "adverse effect." Since the Plaintiff has pointed to no relevant case law that supports a tolling of the limitations period until such time as a plaintiff substantiates that he has suffered an adverse effect, and, since the Court has found none, the Court finds that the statute of limitations was not tolled until the date that the Army disenrolled the Plaintiff.

3. Exhaustion of Administrative Remedies

The Plaintiff's final argument as to why his claim is not time barred is that the two year statue [sic] of limitations was tolled while he pursued his administrative remedies. Doc. #10 at 13-15. In so arguing, the Plaintiff concedes that the Privacy Act does not specifically require a claimant to exhaust administrative remedies before bringing suit, but

asserts that "such a requirement is imposed as a general principal of administrative law." *Id.* at 13 (quoting *Hammie v. SSA*, 765 F. Supp. 1224, 1225 (E.D. Pa. 1981); citing *Haase v. Sessions*, 282 U.S. App. D.C. 163 (D.C.Cir. 1990) and *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323 (D.D.C. 2002)). The Plaintiff goes on to explain that he filed a claim for damages with the Army on December 15, 2005, which was denied on December 21, 2005, at which time he suggests that the "Government thereby ceded jurisdiction to this Court over [LtC.] Washington's willful violation of the Privacy Act." *Id.* at 14. The Plaintiff is apparently arguing that the statute of limitations should not have begun to run until December 15, 2005. *See id.* ("Plaintiff filed this Complaint on June 9, 2006, within . . . six months of the Government ceding jurisdiction after Lovely exhausted his administrative remedies.").

The Privacy Act sets forth four causes of action, to wit:

1. Failure to amend an individual's record, in accordance with his request. 5 U.S.C. § 552a(g)(1)(A).

2. Refusal to comply with an individual's request for records. 5 U.S.C. § 552a(g)(1)(B).

3. Failure to maintain accurate records, when an individual suffers an adverse determination based on those inaccurate records. 5 U.S.C. § 552e(g)(1)(C).

> 4. A catchall provision, which authorizes suit if an agency fails to comply with any other command of the Privacy Act. One of those commands is contained in section (b) of the Act, which forbids an agency from disclosing a record to a third party without the prior written consent of the individual to whom the record pertains. 5 U.S.C. § 552a(b), (g)(1)(D).[20]

The statute further provides that the United States may be liable for damages, in certain circumstances, for violations of the third and fourth causes of action, but not for violations of the first or second such. 5 U.S.C. § 552a(g)(4) (imposing liability for damages, if a court determines that the agency acted in an intentional or willful manner, in violating either § 552a(g)(1)(C) or (D)).

Although the Sixth Circuit has not addressed this issue, the consensus of the courts that have is that plaintiffs are required to exhaust administrative remedies when alleging that an agency has failed to act, in violation of paragraphs (A) and (B) of § 552a(g)(1)) (failure to amend or disclose records),[21]

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[20] The Plaintiff's claim, in this case, falls within the fourth provision. Doc. #16 (Compl.) ¶ 17.

[21] *E.g.*, *Quinn v. Stone*, 978 F.2d 126 (3rd Cir. 1992) (holding that there is an administrative exhaustion requirement for suits for *amendment* of records); *see also Pollack v. Department of Justice*, 49 F.3d 115, 117 n.1 (4th Cir. 1995) (noting that the plaintiff's Privacy Act claim was not properly before the district

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but are not required to do so, when seeking damages for alleged violations of paragraphs (C) and (D) of § 552a(g)(1) (failure to properly maintain a record, which leads to an adverse determination, or some other failure to comply with the Privacy Act that causes an adverse effect).[22] This distinction is logical, given that an agency should be afforded an opportunity to first respond to a request for documents or amendments to documents, before a court gets involved. As to claims for damages, however, there is no statutory authority for an agency to award damages for improper actions it has already taken, so those claims are more appropriately within the court's area of responsibility. *See Pope v. Bond*, 641 F. Supp. 489, 500 (D.D.C. 1986).

The first two cases cited by the Plaintiff fall within the first such category of suits, wherein the

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court because he did not first exhaust administrative remedies where he was *requesting* documents).

[22] *E.g., Christensen v. United States Dept. of Interior*, 2004 U.S. App. LEXIS 19835, **5-6 (10th Cir. Sept. 22, 2004) ("[T]here is no basis for tolling the limitations period while Plaintiff pursued his administrative claim, because there is no administrative exhaustion requirement when a plaintiff seeks damages under the Privacy Act"); *Haase v. Sessions*, 893 F.2d 370, 374 (D.C. Cir. 1990) (noting that § 552a(g)(1)(D) claims do not require exhaustion); *Diederich v. Dept. of Army*, 878 F.2d 646, 647-48 (2d Cir. 1989) (holding that the exhaustion doctrine does not bar suits for damages); *Salih Rashad Majied v. United States*, 2007 U.S. Dist. LEXIS 29068, **12-14 (W.D. Va. 2007) (same); *Uhl v. Swanstrom*, 876 F. Supp. 1545, 1560-61 (N.D. Iowa 1995), *aff'd* 79 F.3d 751 (8th Cir. 1996) (same).

courts determined that exhaustion was appropriate when an agency allegedly failed to release records, in violation of § 552a(g)(1)(B) (rather than (g)(1)(D)), so are not applicable here. *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 327 (D.D.C. 2002); *Hammie v. SSA*, 765 F. Supp. 1224, 1225 (E.D. Pa. 1991). Nor is the third case cited by the Plaintiff helpful to his case, in that it specifically states that claims brought under § 552a(g)(1)(D) "do[ ] not require exhaustion." *Haase v. Sessions*, 893 F.2d 370, 374 (D.C. Cir. 1990).

The Court finds, therefore, that the Privacy Act does not require that the Plaintiff exhaust administrative remedies before bringing suit for an alleged violation of 5 U.S.C. § 552a(g)(1)(D) and, thus, is not persuaded by the Plaintiff's third and final argument as to why his Privacy Act claim should not be time barred.

Since the Plaintiff filed his claim over four months after the two year statutory period expired and because the statute was not tolled in the meantime, the Plaintiff's Privacy Act claim is barred by the statute of limitations and the Defendant's Motion to Dismiss the Plaintiff's Privacy Act claim (Doc. #19), for lack of subject matter jurisdiction, is SUSTAINED.

B. FTCA Claim for Intentional Infliction of Emotional Distress

The Plaintiff's Complaint alleges that the Defendant wrongfully and intentionally inflicted emotional distress upon him, in violation of the FTCA, by taking the following actions: releasing the e-mail to the female cadet, making false statements about him to other students, wrongfully interfering with the University non-academic disciplinary board hearing process, wrongfully interfering with the ROTC disenrollment hearing process and intimidating his intended witnesses in these hearings. Doc. #16 ¶¶20-24. Among other things, the Defendant argues that the Court does not have subject matter jurisdiction to hear this claim, because it is barred by the *Feres* doctrine, which disallows tort claims that arise from activities incident to military service. Doc. #19 (Def.'s Mot. to Dismiss) at 4-12 (citing *Feres v. United States*, 340 U.S. 135 (1950)); Doc. #24 (Def.'s Reply Mem.) at 1-4.

The Court will now turn to an analysis of the *Feres* doctrine, as it applies to the facts of this case. As an initial matter, however, the Court notes that if the Plaintiff's claim is *Feres*-barred, the Court does not have subject matter jurisdiction over the litigation, pursuant to Federal Rule of Civil Procedure 12(b)(1).[23] *Jackson v. United States*, 110 F.3d 1484,

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[23] As further explained by the Second Circuit:

The FTCA was intended as a partial waiver of sovereign immunity. "Absent a waiver, sovereign immunity

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1486 (9th Cir. 1997); *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996); *Wojton v. United States*, 199 F. Supp. 2d 722, 731-34 (S.D. Ohio 2002) (considering *Feres* challenge as factual attack on court's subject matter jurisdiction).

1. The *Feres* Doctrine in General

The FTCA allows a plaintiff to sue the government for injuries caused by a government employee's negligence, when acting within the scope of employment, under circumstances where a private individual would be liable for such negligence. 28 U.S.C. § 1346(b). This provision, however, is subject to a judicially-created exception, as spelled out by the United States Supreme Court, in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Court held that the FTCA's waiver of sovereign immunity does not apply to certain negligence actions brought by military personnel. Specifically, the Court ruled that the government "is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of

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> shields the federal Government and its agencies from suit. . . . [Thus, s]overeign immunity is jurisdictional in nature." Because the *Feres* doctrine concerns the waiver of sovereign immunity, a question of whether a FTCA claim is barred by *Feres* is necessarily one of jurisdiction.

Wake v. United States, 89 F.3d 53, 57 (2d Cir. 1996) (quoting *Dorking Genetics v. United States*, 76 F.3d 1261, 1264 (2d Cir. 1996) and citing *Feres v. United States*, 340 U.S. 135 (1950), among others)).

or are in the course of activity incident to service." *Id.* at 146.

When deciding cases involving a *Feres* challenge, a court's analysis often turns on whether an individual has sustained an injury "incident to military service." The Sixth Circuit instructs that such injuries are *Feres*-barred because they are the types of claims "that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Brown v. United States*, 462 F.3d 609, 614-15 (6th Cir. 2006) (quoting *United States v. Shearer*, 473 U.S. 52, 59 (1985)).[24] The Appellate Court further instructs that

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[24] The Sixth Circuit has provided an excellent summary of the two subsequent Supreme Court cases, which have applied the *Feres* doctrine, in cases similar to the one at bar:

> In [*United States v. Shearer*, 473 U.S. 52 (1985)], plaintiff's decedent was an Army private who was kidnapped and murdered by another serviceman while off duty and away from the base. Plaintiff alleged that Army negligence had caused her son's death. In reversing the [lower court's] conclusion that "an off-duty serviceman [murdered] and not engaged in military duty at the time of injury, can recover under FTCA," *Shearer v. United States*, 723 F.2d 1102, 1106 (3d Cir. 1983), the Court found the relevant inquiry to be not the situs of the act or incident but "whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline." 473 U.S. at 57 (citations omitted). The Court concluded that an impermissible level of civilian judicial involvement would result if this type of case were permitted, since commanding officers

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"courts should take a flexible approach to government claims of immunity in actions brought under the Federal Tort Claims Act," *id.* at 615 (citing *Shearer*, 473 U.S. at 57), and points out that

> Supreme Court precedents make it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, all injuries suffered by military personnel *that are remotely related to the individual's status as a member of the military*, without regard to the location of the event, the status

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would likely have to testify about their practices and policies in disciplining subordinates and dictating their off-base conduct. *Id.* at 58.

In [*United States v. Johnson*, 481 U.S. 681 (1987)], Johnson, plaintiff's husband was killed in a helicopter crash during a rescue mission due to the alleged negligence of an air traffic controller employed by the Federal Aviation Administration (FAA). The Court once again reversed the court of appeals by applying the *Feres* doctrine, even though the alleged negligence did not involve any military personnel. In the same way it had held that the situs of the incident was not determinative in *Shearer*, the Court found that the status of the tortfeasor as a civilian governmental employee was similarly insignificant. Since the accident had occurred while the pilot was engaged in a service-related mission, suit was barred because its maintenance would "necessarily implicate[] the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." 107 S. Ct. at 2069.

Major v. United States, 835 F.2d 641, 644 (6th Cir. 1987).

> (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.

Fleming v. United States Postal Serv., 186 F.3d 697, 699 (6th Cir. 1999) (emphasis added) (citing *Skees v. United States*, 107 F.3d 421, 423-24 (6th Cir. 1997) (noting that incident-to-service is not "limited to military training and combat"); *Sidley v. United States*, 861 F.2d 988, 990 (6th Cir. 1988) ("The *Feres* doctrine extends beyond situations where the soldier is acting pursuant to orders or while subject to direct military command or discipline."); *Major v. United States*, 835 F.2d 641, 644-45 (6th Cir. 1987));[25] *see also Mackey v. United States*, 226 F.3d 773, 776 (6th Cir. 2000) ("[T]he *Feres* doctrine applies to intentional torts.").

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[25] *Contrast Fleming v. United States Postal Serv.*, 186 F.3d 697 (6th Cir. 1999), where the Sixth Circuit determined that the *Feres* doctrine was inapplicable. The plaintiff's injury in that case occurred when he was in an accident driving to a restaurant, which was not on military property, before reporting for military duty. Because the act in question was not even remotely related to the individual's status as a member of the military, the Court determined that *Feres* did not bar suit against the driver of the other vehicle. In so doing, the Court cited favorably the holding in *Green v. Hall*, 8 F.3d 695, 700 (9th Cir. 1993), which determined that a challenged action was not *Feres* barred if it was a "distinctly nonmilitary act, [that was] not done under orders, was not intended to benefit the military, and did not occur on military property." 186 F.3d at 700.

Other courts have determined that "whether the activity [was] limited to military personnel and whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service" is also relevant in deciding these cases. *Wake v. United States*, 89 F.3d 53, 58 (2d Cir. 1996) (finding plaintiff's claim *Feres*-barred where ROTC cadet suffered injuries while a passenger in a car, which was owned and operated by the ROTC program and the cadet was being transported to a military clinic for a mandatory physical examination) (citing *Sanchez v. United States*, 878 F.2d 633, 634 (2d Cir. 1989), which barred a claim for negligent servicing of automobile where use of base service station was limited to service members and civilians connected with military mission and suit would involve impermissible civilian inquiry into policies and procedures for operation of military controlled facility).

2. *Feres* Doctrine and ROTC Students

Although the Sixth Circuit has not had occasion to decide such a case, other courts have determined that the *Feres* doctrine applies to ROTC cadets and is to be applied, as in the case of other military personnel, to bar claims made by ROTC cadets for injuries sustained incident to military service. *E.g.*, *Brown v. United States*, 151 F.3d 800, 805 (8th Cir. 1998) (injury allegedly caused by negligence of Army surgeon); *Wake v. United States*, 89 F.3d 53 (2d Cir. 1996) (barring claim for injury sustained in military

vehicle accident while returning from naval hospital where cadet had undergone precommissioning physical); *Morse v. West*, 975 F. Supp. 1379, 1381 (D. Colo. 1997) (alleging, among other things, unwanted sexual advances from male cadet, hostile environment, retaliation for reporting sexual harassment, intentional infliction of emotional distress); *Mangan v. Weinberger*, 1987 U.S. Dist. LEXIS 14159 (D. Minn. Feb. 13, 1987) (contending improper assessment of cadet as possessing a personality disorder and that various defendants conspired together to disenroll him from ROTC, based upon affiliation with certain political party). The focus in these cases, just as it is in all *Feres* cases, is whether the ROTC cadet sustained his or her alleged injuries incident to service. The Court's task in this case, then, is to do the same.

3. Whether Lovely Sustained his Alleged Injuries Incident to Military Service

In his Complaint, the Plaintiff alleges that he suffered emotional distress because of the following actions by LtC. Washington: release of the e-mail to the female cadet, making false statements about him to other students, wrongfully interfering with the University non-academic disciplinary board hearing process, wrongfully interfering with the ROTC disenrollment hearing process, and intimidating his intended witnesses in these hearings. Doc. #16 ¶¶120-24. In his Memorandum in Opposition to the Defendant's Motion to Dismiss, the Plaintiff seems to

have dropped the emphasis on the ROTC disenrollment hearings, in that he points only to the following actions, of LtC. Washington, relative to the University disciplinary board hearing:

- Conspiring with the female cadet and her counselor to discredit the Plaintiff before the University board
- Giving the female cadet the e-mail for her use at the University board
- Making false statements to Dr. Ensalaco, in obtaining the e-mail at issue[26]
- Falsely telling other students that the Plaintiff admitted to "raping" the female cadet at the hearing, when, in fact, he denied this accusation; further, wrongfully stating that he, Washington, had learned of this admission because he listened to tapes of the hearing

Doc. #22 at 3, 15. In both his Complaint and his Memorandum, the Plaintiff also alleges that LtC. Washington's acts included intimidating and unlawfully influencing the Plaintiff's witnesses before the University hearing. Doc. #16 ¶21; Doc. #22 at 3, 15. In support of this allegation (and the other allegations in the Memorandum), the Plaintiff points generally to Exhibits A, B, C and D, to his first response to the Defendant's Motion to Dismiss (Doc. #10). Doc. #22 at 3, 15. The Court was unable to find any support in the generally cited documents for the

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[26] Presumably, the false statement is that LtC. Washington intended to put the e-mail in Lovely's records.

intimidation/unlawful influence allegation, however, so will not consider the same herein.

In order to determine whether the Plaintiff's claim is *Feres*-barred, the Court must now determine whether the noted actions were taken "incident to the Plaintiff's military service." In so doing, the dispositive inquiry is whether the Plaintiff "stood in some sort of relationship to the service such that the events arose out of activity incident to service." *Morse v. West*, 975 F. Supp. 1379, 1381 (D. Colo. 1997) (citing *Quintana v. United States*, 997 F.2d 711, 712 (10th Cir. 1993)); *see also Duffy v. United States*, 966 F.2d 307, 312 (7th Cir. 1992) (same).

The Plaintiff was a senior ROTC scholarship cadet, at the time of the actions in question.[27] Sections 2001-2199, of Title 10 of the United States Code, pertain to the training and education of members of the armed forces, to include ROTC cadets. Section 2005 covers "Advanced Education Assistance: Active Duty Agreement; Reimbursement Requirements," and provides that the Secretary of the Army may require, as a condition to providing advanced education assistance to any person, that such person enter into a written contract under which he agrees –

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[27] According to the Eighth Circuit, "Senior ROTC members are required to swear an oath of loyalty, join a reserve component of an armed force, and agree both to complete the course of training and to accept a commission for a term of service in the military following training." *Brown v. United States*, 151 F.3d 800, 805 (8th Cir. 1998) (citing 10 U.S.C. §§ 2104(b), 2105).

(1) *to complete the educational requirements specified in the agreement* and to serve on active duty for a period specified in the agreement;

(2) that if such person *fails to complete the education requirements specified in the agreement*, such person will serve on active duty for a period specified in the agreement;

(3) that if such person, voluntarily or *because of misconduct*, fails to complete the period of active duty specified in the agreement, or *fails to fulfill any term or condition prescribed pursuant to clause (4)*, such person will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided such person as the unserved portion of active duty bears to the total period of active duty such person agreed to serve;

(4) *to such other terms and conditions as the Secretary concerned may prescribe to protect the interest of the United States.*

10 U.S.C. § 2005(a) (effective 2004) (emphasis added). In pertinent part, Army Regulation 145-1 ("Senior Reserve Officers' Training Corps Program: Organization, Administration, and Training), provides that a senior ROTC scholarship cadet "*will be disenrolled* for the following reasons:"

- *Because of withdrawal or dismissal from the academic institution. . . .*

- *Misconduct, demonstrated by* disorderly or disrespectful conduct in the ROTC classroom or during training, or other *misconduct that substantially interferes with* the ROTC mission, including participation in unlawful demonstrations against the ROTC, *illegal interference with rights of other ROTC students*, or similar acts.

- *Undesirable character demonstrated by cheating on examinations*, stealing, unlawful possession. . . . Such acts may also be characterized as misconduct.

- *Breach of contract* (including formerly used term willful evasion). (*Note:* Breach is defined as any act, performance or nonperformance on the part of a student that breaches the terms of the contract regardless of whether the act, performance or nonperformance was done with specific intent to breach the contract or whether the student knew that the act, performance or nonperformance breaches the contract).

AR 145-1, ¶ 3-43a(4), (12), (14), (16) (www.army.mil/usapa/epubs/pdf/r145_1) (emphasis added). Finally, the contract entered into between the Plaintiff and the Government, in the present case, provides that in return for the Government's payment of education assistance, the Plaintiff agreed to the following:

- To remain a full-time student at the University of Dayton until he received his degree.
- To complete his degree by May 2005.
- To maintain eligibility for enrollment in ROTC, enlistment in the USAR, and commissioning, as defined by statute, Army regulation, and this contract, throughout the period of the Contract.
- If disenrolled from the ROTC program for, among other things, failing to complete the educational requirements specified in the agreement or other educational requirements for ROTC cadets as specified in Army Regulations or for misconduct, that the Army may order him to active duty as an enlisted soldier or require him to reimburse the Government for his educational costs.

Doc. #19, Attach. #1 (ROTC Contract).

The actions complained of by the Plaintiff were all geared towards LtC. Washington's allegedly improper interference with the University disciplinary hearing, which pertained to the female cadet's allegations of improper sexual advances by the Plaintiff. As is clear by the outcome of that hearing, a potential result of the same was that the Plaintiff might have been suspended from the University. Such an outcome would violate the Plaintiff's obligation under the afore-cited statutory section, Army Regulation and ROTC Contract, to remain a full-time student at the University of Dayton until completion of his

degree. *Accord United States v. Bush*, 247 F. Supp. 2d 783 (M.D.N.C. 2002) (ROTC scholarship terminated due to cadet's misconduct); *Molls v. Keenan*, 1996 U.S. Dist. LEXIS 847, *2 (N.D.N.Y. Jan. 26, 1996) (ROTC cadet's scholarship removed after he failed to obtain the required grade point average); *Rameaka v. Kelly*, F. Supp. 303 (D.R.I. 1972) (ROTC cadet's scholarship withdrawn for academic and attendance reasons). For this reason alone, the Army had a vested interest in knowing whether the Plaintiff was to remain a student in good standing at the University of Dayton. Thus, LtC. Washington's actions were more than remotely related to the Plaintiff's status as a member of the military, which is what the Sixth Circuit requires, in a *Feres* analysis. *Fleming v. United States Postal Serv.*, 186 F.3d 697, 699 (6th Cir. 1999).

Along these same lines, the Plaintiff was a student at the University of Dayton, pursuant to a ROTC scholarship. Thus, he was "taking advantage of a privilege or enjoying a benefit conferred as a result of military service," which is a relevant consideration in *Feres* decision. *Wake v. United States*, 89 F.3d 53, 58 (2d Cir. 1996).

Furthermore, the complained-of actions all involved LtC. Washington's interactions with the ROTC cadets at the University of Dayton. Army Regulation 145-1 describes the responsibilities of a PMS, such as LtC. Washington, as follows:

> Professors of Military Science (PMS) are the key to the success of the ROTC Program. They will –

(1) Structure and manage the Military Science (MS) Program to blend the philosophies of the host academic institution with the needs of the Army.

(2) Command the military personnel assigned to the Department of Military Science (ROTC detachment). All personnel assigned to ROTC at the host institution and any extension center will be assigned to this department. They will be directly under the control of the PMS in all matters related to their military status and assigned duties.

(3) Ensure that the ROTC Program is properly administered as prescribed by applicable statues [sic], DOD Directives, Army regulations, programs, objectives, and policies.

AR 145-1, ¶ 1-4i (www.army.mil/usapa/epubs/pdfr145_1.pdf). Thus, the PMS plays an integral role in the functioning of the ROTC component at his or her assigned academic institution. For the Court to question LtC. Washington's interactions with the cadets assigned to his ROTC unit would involve the Court in just the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the *Feres* doctrine cautions against. *Brown v. United States*, 462 F.3d 609, 614-15 (6th Cir. 2006). It is not the judiciary's province to interfere with how the PMS of a ROTC unit conducts the business of that organization.

For the reasons set forth above, the Court finds that the Plaintiff's FTCA claim is barred by the *Feres* Doctrine. Therefore, the Defendant's Motion to Dismiss the Plaintiff's FTCA claim (Doc. #19), for lack of subject matter jurisdiction, is SUSTAINED.

IV. CONCLUSION

The Defendants' Motion to Dismiss (Doc. #19) is SUSTAINED, as to both the Plaintiff's Privacy Act claim and FTCA claim. Consequently. the Plaintiff's Motion to Compel Discovery and for Sanctions (Doc. #30) is OVERRULED, as moot. Judgment will be entered in favor of the Defendant and against the Plaintiff herein.

All rulings hereunder are made on the condition that the Defendant provides proper Rule 56 evidence of the following documents, to the Court, within ten (10) days of the date of this Order:

- Ensalaco e-mail to Washington, dated February 16, 2004 (Doc. #10, Ex. K7)
- Washington e-mail to Col. Garcia, dated June 18, 2004 (Doc. #16, Ex. B)
- Letter from University of Dayton to LtC. Washington, dated March 18, 2004 (Doc. #10, Ex. K8)
- Department of Army Memorandum, dated October 7, 2005 (Doc. #10, Ex. Q)
- Letter from Attorney Podlaski to Col. Frusha, dated April 12, 2005 (Doc. #10, Ex. I)

- Facsimile from Command Judge Advocate to Attorney Podlaski, dated July 12, 2005 (Doc. #10, Ex. M)
- Letter from Attorney Podlaski to Armor Center Commander, dated December 15, 2005 & Standard Form 95 (Doc. #10, Ex. R)
- Letter from Staff Judge Advocate to Attorney Podlaski, dated December 21, 2005 (Doc. #10, Ex. S)
- ROTC Contract, dated August 26, 2002 (Doc. #19, Attach. #1)

Failing this, the Decision and the Judgment entered hereon will be vacated.

The above captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

March 17, 2008

/s/ Walter Herbert Rice
WALTER HERBERT RICE,
JUDGE UNITED STATES
DISTRICT COURT

Copies to:

Counsel of record

Supreme Court, U.S.
FILED
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No. 09-370

In the Supreme Court of the United States

WAYNE G. LOVELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the *Feres* doctrine to bar petitioner's claim for intentional infliction of emotional distress based on the actions taken by his Reserve Officers' Training Corps Battalion Commander relating to petitioner's incidents of plagiarism and alleged sexual assault of a female cadet.

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In the Supreme Court of the United States

No. 09-370

WAYNE G. LOVELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 570 F.3d 778. The opinion of the district court (Pet. App. 18-60) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2009. The petition for a writ of certiorari was filed on September 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. At all relevant times, petitioner was a Senior Army Reserve Officers' Training Corps (ROTC) Cadet and an ROTC scholarship student at the University of Dayton (University). Lieutenant Colonel Versalle Washington was the Professor of Military Science and

Director of the Department of Military Science at the University of Dayton. As such, he was the ROTC Battalion Commander for petitioner and all other cadets at the University, responsible for training them to attain a commission as an Army officer. Lt. Col. Washington was both a full professor on the faculty of the University and an active duty Army officer. Pet. App. 3, 20, 26.

As an ROTC scholarship recipient, petitioner entered into a contract with the Army governing his tenure at the University, the financial terms of the scholarship, and petitioner's continuing obligations to the Army. C.A. Record on Appeal 156-168 (C.A. ROA). The contract makes clear that "the sole purpose of the ROTC scholarship program is to produce officers for the United States Army." Pet. App. 3 (quoting C.A. ROA 156). Among other things, it required petitioner to enroll in and successfully complete the necessary courses for a degree by May 2005, and to "remain a full-time student" at the University until receiving that degree. *Id.* at 3, 27; C.A. ROA 156. Petitioner also agreed to enlist in the Army Reserves for a period of eight years, to maintain eligibility for enrollment in ROTC, and to successfully complete the ROTC program, including ROTC Advanced Camp and all required military training. Pet. App. 3, 27; C.A. ROA 156. Upon completion of his studies and all applicable ROTC training obligations and requirements for appointment, petitioner was to serve as a commissioned officer in the Army or the Army Reserves. C.A. ROA 159-160.

In exchange, the Army agreed to pay up to $17,000 per year for tuition and educational fees, to reimburse petitioner for textbooks, equipment, and other classroom supplies, to pay a subsistence allowance, and to

provide military pay for his attendance at ROTC Advanced Camp. Pet. App. 3, 28; C.A. ROA 164.

If petitioner failed to complete his educational requirements, or if he was disenrolled from the ROTC program for misconduct or failure to comply with any other terms of the contract, he could be ordered to active duty as an enlisted soldier for up to four years, or ordered to repay the financial assistance he had received under his ROTC scholarship. Pet. App. 3-4, 27-28; C.A. ROA 161.[1]

b. In December 2003, Dr. Mark Ensalaco, the Director of the Department of International Studies, discovered that petitioner had plagiarized a research paper. Petitioner did not dispute the charge and received a failing grade for that course. Dr. Ensalaco notified Lt. Col. Washington about the incident, and offered to prepare a written statement. Pet. App. 4, 20-21.

The following month, a female ROTC cadet reported to Lt. Col. Washington that petitioner had sexually assaulted her four months earlier. Lt. Col. Washington suggested that she contact the police, which she chose not to do, and then advised her to go to the University's counseling center, which she did do. Following the advice of the counselor, the female cadet decided to pursue University disciplinary proceedings against petitioner. See Pet. App. 4, 21.

The disciplinary hearing was held on February 17, 2004. Prior to that hearing, the female cadet, who knew about petitioner's plagiarism through other means, asked Lt. Col. Washington if he could get a statement

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[1] The contract terms discussed in the text are reflected in legislation Congress enacted to govern the ROTC program. See 10 U.S.C. 2104, 2105, 2107; see also Pet. App. 53-55 (setting forth terms of the relevant statutes and Army regulations pertaining to the responsibilities and benefits of accepting an ROTC scholarship).

from Dr. Ensalaco about the incident. Lt. Col. Washington contacted Dr. Ensalaco, and Dr. Ensalaco sent him an e-mail describing the relevant events. Lt. Col. Washington printed the e-mail and gave a copy to the female cadet, who presented it to the University's Disciplinary Board at the hearing. See Pet. App. 4-5, 21-23.

At the conclusion of the hearing, the Board found that petitioner had engaged in "non-consensual sexual intercourse" with the female cadet. Pet. App. 5, 23. The University's Judicial Review Committee denied petitioner's appeal, *id.* at 5, and petitioner was suspended from the University for "nonacademic disciplinary reasons" until May 2005, *id.* at 23; C.A. ROA 307.

On October 7, 2005, petitioner was disenrolled from the ROTC program based on his "undesirable character as demonstrated by [his] academic dishonesty." C.A. ROA 320 (disenrollment letter, noting the plagiarism incident as well as a previous incident in which petitioner had sought and received assistance on a Spanish composition project in violation of rules set out by the course instructor); see *id.* at 312-316. Petitioner was ordered to repay the ROTC scholarship money the Army had provided, in the sum of $35,191. *Id.* at 320.

2. After exhausting his administrative remedies, petitioner filed this action. Pet. App. 26. In his amended complaint, petitioner added a claim for intentional infliction of emotional distress under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680.[2] Petitioner alleged that Lt. Col. Washington violated the FTCA by (1) releasing the e-mail he received from Dr.

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[2] Petitioner's original and amended complaint also included a claim under the Privacy Act, 5 U.S.C. 552a. The district court dismissed that claim as time-barred, and petitioner did not appeal that ruling. See Pet. App. 2 n.1; *id.* at 30-44.

Ensalaco to the female cadet who charged that petitioner had sexually assaulted her; (2) falsely telling other ROTC cadets that petitioner had admitted at the hearing that he had sexually assaulted the female cadet; (3) telling other cadets that they should support the female cadet; and (4) intimidating one of petitioner's prospective witnesses for the University disciplinary hearing, causing that person not to testify. Pet. App. 5, 45.[3]

The district court dismissed petitioner's FTCA claim under *Feres* v. *United States*, 340 U.S. 135 (1950), holding that his allegations all arose out of activity that was related to his status as an enlisted Senior ROTC Cadet. Pet. App. 18-60. Relying on the uniform approach of other courts, the district court concluded that "the *Feres* doctrine applies to ROTC cadets and is to be applied, as in the case of other military personnel, to bar claims made by ROTC cadets for injuries sustained incident to military service." *Id.* at 50-51.

Turning to that test, the court reasoned that the alleged injury was related to petitioner's military service because the University disciplinary proceeding for sexually assaulting a female cadet, and the outcome thereof, was integrally related to petitioner's compliance with the ROTC scholarship contract. Pet. App. 56-57 (noting that suspension from the University would violate petitioner's obligation to remain a "full-time student" until

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[3] The complaint also alleged that Lt. Col. Washington wrongly interfered with the subsequent ROTC proceeding by (1) rejecting the University's suggestion that he should not be disenrolled from the ROTC program, and (2) using documents generated by the University as evidence to support his ROTC disenrollment. See Pet. App. 5-6, 45. The district court determined that petitioner abandoned those claims by failing to address them in his opposition to the government's motion to dismiss. *Id.* at 51-52. Petitioner did not challenge that determination.

completion of his degree). Additionally, the court noted, petitioner was "taking advantage of a privilege or enjoying a benefit conferred as a result of military service" at the time of the alleged injury. *Id.* at 57 (quoting *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996)). The court explained that all of the challenged actions "involved [Lt. Col.] Washington's interactions with the ROTC cadets at the University of Dayton," and would require the court "to question [Lt. Col.] Washington's interactions with the cadets assigned to his ROTC unit," "just the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the *Feres* doctrine cautions against." *Id.* at 57-58 (explaining that "[i]t is not the judiciary's province to interfere with how the [Professor of Military Science] of a ROTC unit conducts the business of that organization"). For all of those reasons, the court held that *Feres* barred petitioner's FTCA claim.[4]

3. The Sixth Circuit affirmed. Applying this Court's decisions and prior Sixth Circuit precedent to the "unique circumstances" of the case, the court of appeals agreed that petitioner's intentional infliction of emotional distress claim was barred by the *Feres* doctrine.[5] Pet. App. 12.

The court noted that, "[a]s an ROTC cadet, [petitioner] was enlisted in the Army and was therefore a mem-

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[4] The district court also found that the documents petitioner provided did not support his assertion that Lt. Col. Washington intimidated and unlawfully influenced petitioner's prospective witnesses. See Pet. App. 52-53.

[5] Because it affirmed dismissal under the *Feres* doctrine, the court of appeals did not consider whether the "intentional-torts exception to the FTCA," 28 U.S.C. 2680(h), independently barred petitioner's intentional infliction of emotional distress claim. Pet. App. 9 n.3.

ber of the armed forces, even if not on active duty." Pet. App. 12. All of petitioner's injuries, explained the court, "stemmed from the manner in which his commanding officer chose to conduct the affairs and discipline of his ROTC battalion," *id.* at 13, and "arose 'because of his military relationship with the Government,'" *id.* at 15 (quoting *United States* v. *Johnson*, 481 U.S. 681, 689 (1987)). See also *id.* at 15 (noting that all of the students involved in these incidents were ROTC cadets and that Lt. Col. Washington had access to the plagiarism details and to the University disciplinary proceedings because of his status as petitioner's commanding officer).

Moreover, the court found that petitioner's "attendance" at the University "was a requirement of [his] ROTC contract," and he "received an ROTC scholarship * * * in exchange for his performance under the contract." Pet. App. 16. Thus, the court concluded that, at the time of petitioner's alleged injury, he "was taking advantage of a privilege or enjoying a benefit conferred as a result of military service," *ibid.* (quoting *Wake*, 89 F.3d at 58)—he was "engaged in the activity of serving as an ROTC cadet and an ROTC scholarship student," *id.* at 17. Because petitioner "was engaged in activity incident to service," his claim was "barred by the *Feres* doctrine." *Id.* at 16-17.[6]

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[6] The court of appeals also observed that "[t]o the extent [petitioner] alleges that [Lt. Col.] Washington interfered in the ROTC disenrollment process, this injury even more clearly would seem to arise from an activity incident to military service." Pet. App. 15. As noted (p. 5 n.3, *supra*), the district court's finding that petitioner abandoned those allegations has not been challenged.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. In *Feres* v. *United States*, 340 U.S. 135, 146 (1950), this Court held that in enacting the FTCA, Congress did not intend to authorize suits by service members that "arise out of or are in the course of activity incident to service." In subsequent cases, the Court "has never deviated from this characterization of the *Feres* bar," and has "consistently" applied the *Feres* doctrine "to bar all suits on behalf of service members against the Government based on service-related injuries." *United States* v. *Johnson*, 481 U.S. 681, 686-688 (1987); *id.* at 689 (noting that a "service member is injured incident to service" when he is injured "because of his military relationship with the Government"). As the Court has emphasized, "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules." *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). Rather, "each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Ibid.*

This Court has also articulated "three broad rationales underlying the *Feres* decision." *Johnson*, 481 U.S. at 688. First, because "[t]he relationship between the Government and members of its armed forces is distinctively federal in character, * * * it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to the serviceman." *Id.* at 689 (brackets in original; internal quotation marks and citations omitted). Second, there is an alternative compensation scheme in which "[t]hose injured during the course of activity incident to service not only

receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift and efficient, normally requiring no litigation." *Id.* at 690 (internal quotation marks and citations omitted). Third, "suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the types of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Ibid.* (internal quotation marks, emphasis, and citations omitted); see also *Shearer*, 473 U.S. at 57 (noting that "*Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of maintenance of such suits on discipline'") (citation omitted).

Under these principles, the court of appeals correctly concluded, based on the circumstances of this case, that petitioner's claim is barred. At all times relevant to this suit, petitioner was "enlisted in the Army and was therefore a member of the armed forces." Pet. App. 12. Petitioner was not a private college student. His attendance at the University of Dayton, which gave rise to his claim, was a direct and substantial benefit of service. Cf. *Johnson*, 481 U.S. at 689 n.10 (noting "educational benefits" as an example of "benefits unique to [service members'] service status").[7]

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[7] The courts of appeals have held that *Feres* disallows suits brought after a service member suffers an injury while receiving a military benefit or service to which he is entitled because of his military status, even if he is off duty at the time of the injury. See, *e.g.*, *Pringle* v. *United States*, 208 F.3d 1220, 1222, 1226-1227 (10th Cir. 2000) (per curiam) (claim by soldier beaten by gang members after he was ejected from military social club available to military personnel); *Jones* v.

As a Senior ROTC Cadet receiving a scholarship, petitioner's assignment was to attend classes (both civilian and military) at the University of Dayton, complete his studies and earn a degree by May 2005, and successfully fulfill all military training obligations. Petitioner was accused (and, after a University disciplinary hearing, ultimately found guilty of) sexually assaulting a female ROTC cadet. That hearing could have (and ultimately did) result in sanctions that would have prevented petitioner from fulfilling his ROTC contractual obligations to remain a "full-time" student and to graduate by a date certain. And the instances of plagiarism and academic dishonesty that did lead to petitioner's disenrollment from the ROTC program occurred in University

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United States, 112 F.3d 299, 301-302 (7th Cir.) (medical malpractice claim arising from injury suffered while service member was training for the Military Olympics), cert. denied, 522 U.S. 865 (1997); *Lauer* v. *United States*, 968 F.2d 1428, 1429-1430 (1st Cir.) (claim by off-duty service member injured while walking on military-maintained road to off-post bar), cert. denied, 506 U.S. 1033 (1992); *Bon* v. *United States*, 802 F.2d 1092, 1093, 1095-1096 (9th Cir. 1986) (claim related to service member's injury inflicted while paddling canoe rented from military recreation center); *Bozeman* v. *United States*, 780 F.2d 198, 199, 201 (2d Cir. 1985) (claim related to service member's death in accident after drinking off duty at club available to military personnel); *Rayner* v. *United States*, 760 F.2d 1217, 1219 (11th Cir.) (per curiam) (medical malpractice claim arising out of elective surgery made available because of military status), cert. denied, 474 U.S. 851 (1985); *Woodside* v. *United States*, 606 F.2d 134, 141-142 (6th Cir. 1979) (claim related to military civil engineer's death while flying plane from base's recreational club), cert. denied, 445 U.S. 904 (1980); *Hass* v. *United States*, 518 F.2d 1138, 1139, 1142-1143 (4th Cir. 1975) (claim related to service member's injury while riding horse at military-owned stable); *Chambers* v. *United States*, 357 F.2d 224, 226-227 (8th Cir. 1966) (service member drowned in on-base swimming pool).

courses he was required to pass in order to uphold his end of the ROTC scholarship contract.

Petitioner's claims directly challenge Lt. Col. Washington's supervision and control of ROTC cadets and other official military acts. As the commander of the ROTC battalion at the University, Lt. Col. Washington was responsible for all aspects of the ROTC program. That required him, among other things, to counsel cadets and to address issues in their professional, academic, and personal lives that could affect their ability to accept a military commission. All of the actions complained of by petitioner were undertaken by Lt. Col. Washington in his military capacity. Thus, the "peculiar and special relationship of the soldier to his superiors," *Shearer*, 473 U.S. at 57 (quoting *United States* v. *Muniz*, 374 U.S. 150, 162 (1963)), is at the very core of petitioner's claims. See Pet. App. 13 (petitioner's alleged injuries all "stemmed from the manner in which his commanding officer chose to conduct the affairs and discipline of his ROTC battalion").

The court of appeals correctly applied the *Feres* doctrine to bar petitioner's FTCA claim. Further review is not warranted.

2. a. Petitioner contends (Pet. 8-16) that the courts of appeals apply different legal tests to determine whether a service member's injury is incident to service under the *Feres* doctrine, and that the Sixth Circuit's approach is an outlier among the circuits. The varying approaches, however, largely represent differing verbal formulations that do not often result in conflicting results. And the Sixth Circuit is no exception.

Consistent with *Johnson* and *Shearer*, the courts of appeals apply a totality-of-the-circumstances approach, examining a number of factors to determine whether an

injury is "incident to service" under *Feres*. See *Regan* v. *Starcraft Marine, LLC*, 524 F.3d 627, 645 (5th Cir. 2008) ("The elements of the analysis—the *Feres* rationales and the factors for an activity being incident to service—are fairly uniform" in the case law). These factors include, among others, the service member's military status at the time of injury, the location of the injury, the activity in which the service member was involved at that time, whether the service member was subject to military control and/or discipline at that time, whether the activity arose out of military life, and whether the injury occurred while enjoying a privilege or benefit of military service. See, *e.g.*, *McConnell* v. *United States*, 478 F.3d 1092, 1095 (9th Cir.), cert. denied, 128 S. Ct. 649 (2007); *Schnitzer* v. *Harvey*, 389 F.3d 200, 203 (D.C. Cir. 2004); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000) (per curiam); *Fleming* v. *USPS, Postmaster Gen.*, 186 F.3d 697, 699-700 (6th Cir. 1999); *Richards* v. *United States*, 176 F.3d 652, 655 (3d Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Whitley* v. *United States*, 170 F.3d 1061, 1070 (11th Cir. 1999); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996); *Miller* v. *United States*, 42 F.3d 297, 301 (5th Cir. 1995); *Stephenson* v. *Stone*, 21 F.3d 159, 162 (7th Cir. 1994).[8]

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[8] The only apparent departure from this settled law is *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995). Instead of applying *Shearer*'s totality-of-the-circumstances approach, *Taber* focused on whether the plaintiff was "engaged in activities that fell within the scope of the plaintiff's military employment," as the scope of employment concept is understood under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8102. *Taber*, 67 F.3d at 1050 & n.21. No other court has adopted the *Taber* approach, and the Second Circuit has since

Contrary to petitioner's assertion (Pet. 14-15), the Sixth Circuit's analysis does not focus "entirely on the status of the claimant in the military." Although not setting forth a three-factor test as such, the Sixth Circuit (like other courts) examines the totality of the circumstances and analyzes factors such as the service member's military status at the relevant time, the location of the alleged injury, and the nature of the service member's activity when injured, including whether he or she was taking advantage of a benefit of service. See, *e.g.*, Pet. App. 10-17; *Fleming*, *supra*; *Irvin* v. *United States*, 845 F.2d 126 (6th Cir.), cert. denied, 488 U.S. 975 (1988); *Potts* v. *United States*, 723 F.2d 20 (6th Cir. 1983) (per curiam), cert. denied, 466 U.S. 959 (1984); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980).

Petitioner argues otherwise by quoting a formulation first expressed by the Sixth Circuit over two decades ago in *Major* v. *United States*, 835 F.2d 641 (1987), cert. denied, 487 U.S. 1218 (1988). Pet. App. 10-11 (quoting *Major*, 835 F.2d at 644-645) (noting that *Feres* bars all injuries suffered by military personnel that are "remotely related to the individual's *status* as a member of the military"). Far from conflicting with other courts of appeals (Pet. 14), that language has been cited favorably

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applied the traditional analysis to determine whether an injury is incident to service, stating that "*Taber* does not and could not * * * in any way alter the reach of the *Feres* doctrine." See *Wake* v. *United States*, 89 F.3d 53, 61 (1996). In *Wake*, the Second Circuit implicitly repudiated the *Taber* approach by applying *Feres* to bar the FTCA claim of a service member who was ineligible for FECA benefits because the Department of Labor concluded that her injury was outside the scope of her military employment. *Id.* at 56, 61; see also *Luckett* v. *Bure*, 290 F.3d 493, 497 (2d Cir. 2002) (applying the incident-to-service test in affirming dismissal of complaint as *Feres*-barred).

by several other circuits. See, *e.g.*, *Stewart*, 90 F.3d at 105; *Persons* v. *United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991); *Shaw* v. *United States*, 854 F.2d 360, 364 (10th Cir. 1988). More importantly, petitioner fails to identify any Sixth Circuit *Feres* decision that would have been decided differently in another circuit.

At bottom, petitioner's claimed discrepancy between the approaches adopted by the courts of appeals is a distinction without a difference.

b. Petitioner also contends (Pet. 6-7, 17-20) that this Court's decisions in *United States* v. *Stanley*, 483 U.S. 669 (1987), and *Shearer*, *supra*, provide conflicting directions as to whether or when lower courts should consider the military judgment rationale under *Feres*, and claims a "split in authority" (Pet. 19) on that issue. There is no split and, notably, petitioner fails to identify any court on either side of the purported conflict.

In *Stanley*, this Court did caution against analyzing *Feres*'s military judgment rationale in lieu of applying the "incident to service" test. 483 U.S. at 681-683 (holding that the *Feres* doctrine governs *Bivens* actions brought by service members and rejecting "less protective" military judgment rule in favor of "incident to service" test); see also *Johnson*, 481 U.S. at 684-687 (reaffirming "incident to service" test as the proper analysis in all *Feres* cases). Nothing in *Stanley* suggested that the Court viewed its opinion as being in tension with its decision in *Shearer*, which was issued two years prior. And the lower courts have properly applied both *Stanley* and *Shearer* by addressing *Feres*'s rationales only to confirm that the *Feres* doctrine is applicable under the "incident to service" test, or where the complaint alleges claims that mirror the negligent supervision or control claims at issue in *Shearer* itself. See, *e.g.*, *Regan*, 524

F.3d at 636-637 (explaining that since *Stanley* and *Shearer* were decided, "this and other Circuits * * * continue to examine the applicability of the rationales in specific cases" in addition to—not in place of—the incident to service inquiry); *Stephenson*, 21 F.3d at 163-164 (*Feres* bars actions that, like *Shearer*, allege negligent "choices about the discipline, supervision, and control of a serviceman.") (citation omitted).

3. Petitioner briefly suggests (Pet. 14 n.2) that his case would have been decided differently in another circuit. That is incorrect.

Contrary to petitioner's assertion (Pet. 14 n.2), the court of appeals did not dismiss his claim "solely" because of his status as a university ROTC student. Instead, the court concluded that petitioner's injury "ar[o]se from an activity incident to military service," Pet. App. 13, and occurred "because of his military relationship with the Government," *id.* at 15 (quoting *Johnson*, 481 U.S. at 689). As such, his claim would "involve the Court in just the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the *Feres* doctrine cautions against." *Ibid.* (quoting *id.* at 58). That none of petitioner's injuries would have "occurred had [petitioner] not been an ROTC cadet under Washington's command" (*ibid.*) is surely true, but that is because of the asserted injury—*i.e.*, intentional infliction of emotional distress by a commanding officer in the course of disciplinary proceedings involving a fellow cadet, directly impacting compliance with an ROTC scholarship contract, and calling into question petitioner's ability to receive a military commission. Accordingly, petitioner's claim was not barred "solely" because of his status.

Finally, petitioner contends that ROTC students "do not have the proper duty status to apply the *Feres* bar" unless they are "on orders" or participating in military-related activity at the time of injury. Pet. 15 n.2. Petitioner fails to cite any supporting case law, and every court of appeals to have addressed the question has concluded that the *Feres* doctrine is applicable to ROTC cadets. See *Harrison* v. *United States*, 329 Fed. Appx. 179 (10th Cir. 2009); *Brown* v. *United States*, 151 F.3d 800 (8th Cir. 1998); *Wake* v. *United States*, 89 F.3d 53 (2d Cir. 1996); see also *Morse* v. *West*, No. 97-1386, 1999 WL 11287, at *1 (10th Cir. Jan. 13, 1999) (*Feres* doctrine barred ROTC cadet's sexual harassment claim occurring while completing an ROTC "course of study"). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

WAYNE G. LOVELY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF OF PETITIONER

Contrary to Respondent's contentions, the issues here are whether the Sixth Circuit's blanket denial of a Federal Tort Claims Act ("FTCA") claim under *Feres v. United States*, 340 U.S. 135 (1950) – based solely upon a claimant's remote affiliation with the military – is consistent with this Court's intention in *Feres, and* whether the Sixth Circuit's analysis on the impact such a claim would have on military discipline is appropriate after *United States v. Stanley*, 483 U.S. 669 (1987). Respondent's contentions distort the issues, mischaracterize the Petitioner's injuries, and "spin" the Petitioner into a bad actor – all attempts to distract the Court's focus from the meaningful questions presented by the Petitioner. Respondent's efforts fail and reveal the weakness of its argument.

Respondent's arguments minimize into insignificance the salient questions Petitioner raises about the analysis employed by the Sixth Circuit when examining FTCA claims under *Feres*. If Respondent's contentions are correct, then anyone affiliated with the military, however remote, is engaged in an activity incident to service and therefore, their claim should be barred by the *Feres* doctrine. Respondent – like the court below – mischaracterizes the nature of Petitioner, Wayne G. Lovely's ("Lovely"), injuries and engages in an improper and unnecessary analysis of the military discipline rationale of the *Feres* doctrine in an attempt to justify the Sixth Circuit's overly-broad application of the *Feres* doctrine.

I. RESPONDENT'S CHARACTERIZATION OF LOVELY'S INJURY CANNOT WITHSTAND SCRUTINY.

Respondent's argument that Lovely's asserted injury is the "intentional infliction of emotional distress by a commanding officer in the course of disciplinary proceedings involving a fellow cadet, directly impacting compliance with an ROTC scholarship contract, and calling into question Petitioner's ability to receive a military commission" (Resp. 15), is simply incorrect. Lovely's injury did not occur during the course of a military disciplinary proceeding, nor was Lovely otherwise engaged in an activity incident to his purported service when he was injured.

Instead, Lovely's injury arises out of the intentional infliction of emotional distress caused by LTC Versalle Washington ("Washington") when he: (1) released a protected record to a co-ed student; (2) falsely told other students that Lovely had admitted that he had sexually assaulted the co-ed; (3) told other students that they should support the co-ed and not Lovely; and (4) intimidated one or more of those students who were Lovely's prospective witnesses for the University's administrative proceeding, causing them not to testify on Lovely's behalf at the proceeding. (Resp. 4-5). Lovely's injury is the emotional distress caused by Washington's actions which is unrelated to the outcome of the University Disciplinary Board's hearing, or its after-effects.

Respondent attempts to flip the criteria of *Feres* and its progeny from an examination of the activity of the victim at the time of the injury to the activity of the tortfeasor. Respondent argues that Washington's actions are somehow incident to Lovely's service, and that challenging Washington's actions would involve the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the Court cautioned against in its third rationale of *Feres*.

However, no inquiry into the military discipline rationale is necessary in the case at bar because this case does not involve a matter of military discipline. Washington did not sit on the University's panel at Lovely's disciplinary hearing, he did not report Lovely's alleged academic or non-academic misconduct to the University, nor was he a witness at the University's hearing. In addition, Washington's infliction of emotional distress on Lovely occurred *prior* to the University's non-academic disciplinary hearing. Simply put, the injury was caused in a way that was completely unrelated to Lovely's connection with the military.

Because Lovely's injury was unrelated to any aspect of military discipline, analysis of the third policy rationale of the *Feres* doctrine is wholly inappropriate and, contrary to Respondent's assertions, the Sixth Circuit's analysis of the military discipline rationale was unnecessary – especially in light of the conflicting opinions in *United States v. Shearer*, 473 U.S. 52 (1985) and *Stanley*.

II. THE SIXTH CIRCUIT'S ANALYSIS OF THE MILITARY DISCIPLINE RATIONALE ILLUSTRATES THE SPLIT IN AUTHORITY BETWEEN *SHEARER* AND *STANLEY*.

Respondent acknowledges in its Brief that, in *Stanley,* this Court cautioned against analyzing *Feres'* military judgment rationale in lieu of applying the "incident to service" test and that this Court, in *Johnson*, reaffirmed the "incident to service" test as the proper analysis in all *Feres* cases. (Resp. 14); *Stanley,* 483 U.S. at 681-83; *United States v. Johnson*, 481 U.S. 681, 684-87 (1987). Although Respondent argues that nothing in *Stanley* suggested that the Court viewed its opinion as being in conflict with its decision in *Shearer,* which was issued two years prior, the conflicting approaches highlighted in those decisions have led to uncertainty at the circuit court level. (Resp. 14). Rather than attempting to reconcile the disparity between the two cases over the military discipline rationale, Respondent attempts to sidestep the conflict and states that lower courts have simply continued to examine the applicability of the rationales in addition to – not in place of – the incident to service inquiry. (Resp. 14-15); *see also Regan v. Starcraft Marine*, 524 F.3d 627, 636 (5th Cir. 2008).

The Respondent's argument illustrates the patchwork legal fiction in which the courts currently engage, which at times, such as in the case at bar, leads to inconsistent results. Had the Sixth Circuit followed this Court's most recent decision in *Stanley*, it would not have barred Lovely's claim under the

military discipline rationale of *Feres*. Lovely's claimed injury is simply unrelated to military discipline but, because the Sixth Circuit embarked on a review of the military discipline rationale, it errantly considered the University hearing as an exercise of Washington's purported disciplinary authority over Lovely.

III. THE SIXTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH DECISIONS FROM OTHER CIRCUITS.

As Petitioner showed in his Writ of Certiorari, under the majority approach analysis, a University ROTC student is not a service member within the meaning and intent of *Feres*, absent some qualifying activity or additional authorization. *See, e.g., Regan*, 524 F.3d at 636-38. This is true because ROTC students have a conditions precedent contract and do not have the proper duty status for the *Feres* bar to apply. In *Regan*, the Court recognized the necessity of analyzing both the *status* of an active duty service member on the continuum between performing tasks of an assigned mission to being on extended leave from duty *and* the *activity* in which the claimant was involved when injured, as essential to a proper analysis under *Feres*. *Id.* (Emphasis added).

Respondent argues to the contrary by pointing the Court to cases from other circuits which have concluded that the *Feres* doctrine is applicable to ROTC students. (Resp. 16). However, in each of these

cases, the claimant was involved in military training or a military activity, and the Court looked beyond the claimant's mere affiliation with ROTC and analyzed the activity in which the claimant was involved when injured. Here, the Sixth Circuit looked only at Lovely's affiliation with ROTC and failed to properly analyze the activity in which Lovely was involved in at the time of his injury.

In *Harrison v. United States,* 329 Fed. Appx. 179 (10th Cir. 2009), the claimant's claimed injury was his disenrollment from ROTC. In *Brown v. United States,* 151 F.3d 800 (8th Cir. 1998), the claimant was injured during a military-related training exercise, and his injury aggravated by the negligent treatment of an Army surgeon. In *Wake v. United States*, 89 F.3d 53 (2nd Cir. 1996), the claimant was injured when returning from a military-related activity – a pre-commissioning physical. In *Morse v. West,* 97-1386, 1999 WL 11287 at *1 (10th Cir. Jan. 13, 1999), the claimant was injured while completing educational requirements specifically related to the ROTC program.

In each of the cases, a claimant was involved in a military-related activity when injured. In the case at bar, none of Lovely's injuries occurred while he was involved in any military or military-related activity. Analyzing both the status and activity of the claimant at the time of the injury is essential to a proper analysis under *Feres. Regan,* 524 F.3d at 636-38. In its holding, the Sixth Circuit noted that Lovely was "engaged in the activity of serving as an ROTC cadet

and an ROTC scholarship student." (Resp. 7). Thus, the Court held that Lovely was "*engaged in activity incident to service*", and therefore, his claim was "'barred' by the *Feres* doctrine" simply by virtue of being a student in ROTC. (Resp. 7). (Emphasis added). Accordingly, under the analysis set forth by the Sixth Circuit and urged by Respondent, Lovely's FTCA claim is barred simply because of his affiliation with ROTC. Such a conclusion cannot withstand scrutiny.

In every case cited by Respondent, *Harrison*, *Brown*, *Wake*, etc., the courts examined both the status of the claimant at the time of the injury, that is, his or her relationship to the military – on orders, on duty, or on leave, *and* the activity of the claimant at the time of the injury. (Resp. 7). A myriad of cases allowing reservists and other claimants to pursue claims under the FTCA deny the Respondent's argument and logic. *See, e.g.*, *Elliot v. United States*, 37 F.3d 617 (11th Cir. 1994) (holding that *Feres* did not bar an FTCA action by an injured serviceman and his wife for debilitating injuries they sustained from carbon monoxide poisoning while at their home *on base* at Fort Benning, Georgia); *Regan*, 524 F.3d at 627 (holding that a claimant injured in a boating accident at a military recreational facility that owned the boat was not barred by *Feres* from bringing an FTCA claim); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980) (holding that an off-duty claimant on a four-day furlough driving a civilian vehicle towards his home off the military reservation was not acting

"incident to service" when he was involved in a collision with a vehicle operated by another serviceman); and *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987) (holding that claimant's injuries suffered in a motor vehicle collision between him and another serviceman were not incurred incident to service).

As these cases illustrate, courts must analyze the totality of the circumstances in determining whether a case is *Feres* barred. This involves an assessment of the claimant's involvement with the military and the activity of the claimant when injured. It is not enough that Lovely was simply enrolled in the University ROTC program. In order for his claim to be *Feres* barred, he must have been participating in a military or military-related activity at the time of his injury. Even in *Parker* and *Pierce*, where the claimants were injured by other servicemembers, the claimants' claims were not barred solely because they were serving in the military at the time of injury. Instead, the Court considered the totality of the circumstances and determined that the suffered injury was not incident to service.

Had Lovely's claim been given the same treatment by the Sixth Circuit, it would not have been barred under *Feres*. These cases illustrate that other circuits have allowed FTCA claims by claimants with more intricate ties to the military – including claims brought by active duty members and reservists. If a claimant can be on active duty or a reservist and still bring a successful FTCA action, the Sixth Circuit cannot properly deny a FTCA claim brought

by an ROTC student solely because of that student's status in ROTC.

IV. RESPONDENT MISCHARACTERIZES OTHER CIRCUITS' TREATMENT OF *MAJOR* AND DOWNPLAYS ITS PRECEDENTIAL VALUE.

Out of one side of its mouth, Respondent complains that Lovely quotes a test first established by the Sixth Circuit over two decades ago in *Major v. United States*, 835 F.2d 641 (1987). (Resp. 13). In so doing, Respondent implies that the test in *Major* is old, outdated, and no longer good law in the Sixth Circuit. (Resp. 13). However, even a cursory review of the Sixth Circuit's decision here, shows that the Sixth Circuit relies heavily on *Major* in formulating its opinion in this case.

Out of the other side of its mouth, Respondent argues that *Major* has been favorably cited by other circuit courts. (Resp. 13-14); *see, e.g., Stewart v. United States*, 90 F.3d 102 (6th Cir. 1996); *Persons v. United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991); *Shaw v. United States*, 854 F.2d 360, 364 (10th Cir. 1988). Respondent's assertion is misleading. In *Stewart*, *Persons*, and *Shaw*, instead of embracing *Major* as written, these courts performed an examination of the totality of the circumstances surrounding the claimants' injuries, including an analysis of the nexus between the claimant's affiliation with the military and the activity in which he was

involved when injured, and ignored the language in *Major* holding that a claim should be barred "without regard to [the] . . . location . . . status . . . or nexus . . . from which it arose." *Major*, 835 F.2d at 644-45. While Respondent concedes that the other Courts of Appeal apply a totality of the circumstances approach, Respondent curiously persists in its contention that the Sixth Circuit's approach dismissing these factors is consistent with the approach taken by other circuits. (Resp. 12); *see, e.g., McConnell v. United States,* 478 F.3d 1092, 1095 (9th Cir.), *cert. denied*, 128 S.Ct. 649 (2007); *Schnitzer v. Harvey,* 389 F.3d 200, 203 (D.C. Cir. 2004); *Pringle v. United States,* 208 F.3d 1220, 1224 (10th Cir. 2007); *Richards v. United States,* 176 F.3d 652, 655 (3rd Cir. 1999); *Whitley v. United States,* 170 F.3d 1061, 1070 (11th Cir. 1999); *Day v. Massachusetts Air Nat'l Guard,* 167 F.3d 678, 682 (1st Cir. 1999); *Stewart,* 90 F.3d at 104-5; *Miller v. United States,* 42 F.3d 297, 301 (6th Cir. 1995); *Stevenson v. Stone,* 21 F.3d 159, 162 (7th Cir. 1994).

These other circuit courts recognize that a proper analysis of a FTCA claim under the *Feres* doctrine requires the circuit courts examine the status, location, and activity in which a claimant is involved when injured. However, the Sixth Circuit looked only to Lovely's remote affiliation with the military. Here, such an analysis was lethal to Lovely's claim because according to the Sixth Circuit Court, by simply being an ROTC cadet, Lovely was engaged in an activity incident to service and, therefore, his claim was

automatically barred. Under this logic, a claim brought by any member of the armed forces would be barred simply because the service member is serving in a branch of the United States military. Such an approach is contrary to every other circuit and is contrary to the incident to service and totality of circumstances test.

V. THE SIXTH CIRCUIT IMPROPERLY ANALYZES *FERES'* SECOND RATIONALE.

Finally, as this Court knows, "the existence of . . . generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries, [and] . . . the primary purpose of the FTCA 'was to extend a remedy to those who had been without; if [the FTCA] incidentally [benefitted] those already well provided for, it appears to have been unintentional.'" *Johnson*, 481 U.S. at 689-90. The Sixth Circuit and Respondent's analysis confuses Lovely's affiliation with ROTC with this Court's recognition of Congress's statutory disability and death benefits. In addition, the Respondent's argument further amplifies that error because it mistakenly contends that Lovely's enrollment and scholarship in ROTC is tantamount to engaging in military activity.

Lovely simply was not entitled to any statutory disability or death benefits as part of his enrollment in ROTC. Accordingly, absent his claim under the FTCA, Lovely has no remedy for his injury. The

primary purpose of the FTCA – to extend a remedy to those without one – is frustrated by the Sixth Circuit's blanket application of the *Feres* doctrine and misapplication of the doctrine's second rationale. This result cannot be what the Court intended when it created the *Feres* bar.

CONCLUSION

For all of the foregoing reasons herein, the Court should grant Lovely's Petition for Writ of Certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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